TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 220

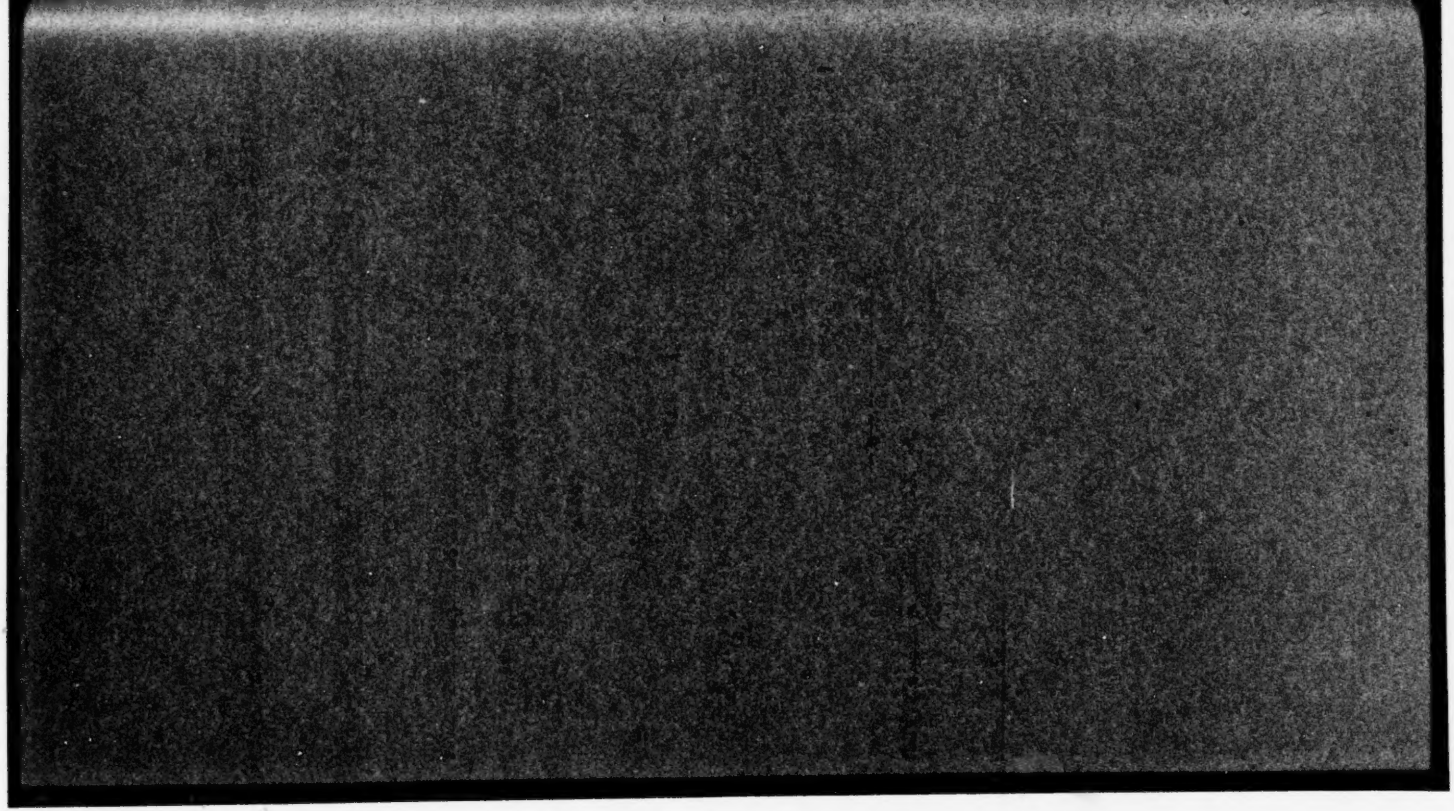
THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

GUSTAV A. KIESEL AND FRANK A. HARRIS.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

FILED SEPTEMBER 30, 1910.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 714.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

GUSTAV E. KISSEL AND THOMAS B. HARNED.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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1 *Petition for writ of error.*

United States Circuit Court for the Southern District of New York, in the Second Circuit.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
vs.
GUSTAV E. KISSEL, THOMAS B. HARNED, IMPLEADED with others, defendants in error.

Now comes the United States of America, by its attorney, Henry A. Wise, and complains that in the record and proceedings had in this cause an order overruling the demurrers interposed by the United States to the several special pleas interposed by the defendants, Gustav E. Kissel and Thomas B. Harned, and directing that said pleas be severally sustained as sufficient in law and directing that judgment be entered in accordance therewith overruling the said several demurrers and each of them, and sustaining said pleas and each of them and dismissing as to said defendants, Kissel and Harned, the indictment found and filed on July 1st, 1909, and in the judgment of said court entered pursuant to and in accordance with said order overruling the said demurrers and adjudging that the said pleas be severally sustained as sufficient in law, and that the indictment so found as aforesaid be dismissed as to the defendants, Kissel and Harned, manifest error hath happened as will appear in the assignment of errors herewith submitted.

2 Wherefore said defendants Kissel and Harned not having been put in jeopardy, the United States of America prays for the allowance of a writ of error and such other orders and process as may cause the same to be corrected by the Supreme Court of the United States.

Dated New York, December 8th, 1909.

HENRY A. WISE,
United States Attorney in and for the Southern District of New York,
Attorney for Petitioner.

The foregoing petition is hereby granted.
Dated New York, December 8, 1909.

GEO. C. HOLT,
U. S. Circuit Judge for the Second Circuit.

(Indorsed:) Service of a copy of the within is hereby admitted and of the assignment of errors. New York, Dec. 8, 1909. William C. Osborn, attorney for Deft. Kissel. Hunt, Hill & Betts, attorneys for Deft. Harned. U. S. Circuit Court, Southern District N. Y. Filed Dec. 8, 1909. John A. Shields, clerk.

3 *Writ of error.*

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit, Greeting:

Because in the record and proceedings, as also in the order and judgment of a plea, which is in the said Circuit Court of the United States in the Southern District of New York for the Second Circuit before you or some of you, in a case between the United States of America and Gustav E. Kissel and Thomas B. Harned, impleaded with others, a manifest error hath happened to the great damage of the said United States of America as by its complaint appears, and being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, and said defendants not having been put in jeopardy, we do command you if judgment be therein given that then under your seal distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within thirty days of the date hereof; that the record and proceedings aforesaid being accepted said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

4 Witness the Hon. Melville W. Fuller, Chief Justice of the United States, on the 8th day of December, in the year of our Lord one thousand nine hundred and nine.

[SEAL.] JOHN A. SHIELDS,
Clerk of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

Allowed by—

GEO. C. HOLT,
U. S. Circuit Court Judge for the Second Circuit.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John A. Shields, clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the pages numbered from one to 153, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause of The United States of America, plaintiff in error, against Gustav E. Kissel and Thomas B. Harned, impleaded with others, defendants in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed at the city of New York, in the Southern [SEAL.] District of New York, in the Second Circuit, this 18th day of December, in the year of our Lord one thousand nine hundred and nine, and of the Independence of the United States the one hundred and thirty-fourth.

JOHN A. SHIELDS, *Clerk.*

5 (Indorsement:) Form No. 336. U. S. Circuit Court, Southern District of New York for the Second Circuit. The United States of America, plaintiff in error, vs. Gustav E. Kissel and Thomas B. Harned, impleaded with others, defendants in error. Writ of error. U. S. Circuit Court, Southern District, N. Y. Filed Dec. 8, 1909. John A. Shields, clerk. Henry A. Wise, United States attorney, attorney for U. S. Service of a copy of the within is hereby admitted. New York, Dec. 8, 1909. William C. Osborn, attorney for Deft. Kissel to Hunt, Hill & Betts, attorney for Deft. Harned.

6 *Indictment.*

In the Circuit Court of the United States of America for the Southern District of New York, of the June term, in the year nineteen hundred and nine.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The grand jurors for the United States of America, empaneled and sworn in the Circuit Court of the United States of America at the June term thereof in the year nineteen hundred and nine, and inquiring for that district, upon their oath present, that for six years and upwards prior to the day of the finding and presentation of this indictment, The American Sugar Refining Company, hereafter in this indictment called corporation defendant, has been, and now is, a corporation organized and existing under and by authority of the laws of the State of New Jersey, with its principal offices at No. 117 Wall street, in the Borough of Manhattan, in the city of New York, and in said Southern District of New York; and that Washington B. Thomas, Arthur Donner, Charles H. Senff, John Mayer, George H. Frazier, and John E. Parsons, each late of said borough, city, and district, have been respectively directors of said corporation, and together have controlled and managed its affairs, said John E. Parsons also being its *gerenal* counsel and said Arthur Donner its treasurer.

And the grand jurors aforesaid, upon their oath aforesaid,
7 do further present, that throughout the period of time aforesaid The American Sugar Refining Company aforesaid has carried on, among others, the business of manufacturing refined sugar from suitable raw materials, at its manufacturing plant situated in Jersey City in the State of New Jersey (that being an article of prime necessity to and used in enormous quantities by the people

of the United States); of selling such refined sugar to dealers therein and consumers thereof in all the States of the United States, and, in pursuance of such sales, shipping such refined sugar from said place of manufacture in part into said State of New Jersey, but principally into all the other States of the United States, to such dealers and consumers; and of shipping such refined sugar from such place of manufacture to its agents in said State of New Jersey and in such other States, for sale there on its account by such agents to dealers in and consumers of the same; and that in so carrying on said business in the manner aforesaid said corporation defendant has been and is now engaged in trade and commerce among the several States of this Union within the meaning of the act of Congress approved July 2, 1890, and entitled "An act to protect trade and commerce against unlawful restraints and monopolies;" and, further, that of the total volume of such interstate business, trade, and commerce which has been carried on during the period aforesaid by said corporation defendant and by its competitors, said corporation defendant has had and controlled the principal part, that is to say, ninety per centum thereof.

And the grand jurors aforesaid, upon their oath aforesaid, do further present that throughout said period of six years the Pennsylvania Sugar Refining Company has been and now is a corporation organized and existing under and by authority of the laws of
8 the State of Pennsylvania; that said Pennsylvania Sugar Refining Company was organized and created and has existed for the purpose of carrying on, in competition with said corporation and individual defendants, to the extent of its capacity, the same business, trade, and commerce, except as to volume and place of manufacture, as that in this indictment before described as the business, trade, and commerce of said corporation defendant; that said Pennsylvania Sugar Refining Company, early in said period, to wit, on the thirtieth day of December, in the year nineteen hundred and three, having, by the expenditure of a large sum of money, to wit, the sum of two millions of dollars, acquired the necessary grounds for and erected an extensive sugar-manufacturing plant at the city of Philadelphia, in the State of Pennsylvania, and provided the necessary facilities for so doing, was about to engage in and carry on, and intended to engage in and carry on, said business, trade, and commerce, in accordance with said purpose of its organization, creation, and existence, and throughout the remainder of said period would so have carried on said business, trade, and commerce, if it had not been for the unlawful and corrupt conduct of said corporation defendant, of its said directors, and of certain other individual defendants, hereinafter named, which is now to be described.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that The American Sugar Refining Company aforesaid, corporation defendant as aforesaid, said Washington B. Thomas, Arthur Donner, Charles H. Senff, John Mayer, George H. Frazier, John E. Parsons, and one Thomas B. Harned and one Gustav E.

Kissel, in this indictment hereafter called individual defendants, on said thirtieth day of December, in the year nineteen hundred
9 and three, and continuously and at all times during said period of six years, to wit, from that day until and on the day of the finding and presentation of this indictment, each then well knowing all the premises in this indictment aforesaid, in violation of the provisions of section one of said act of Congress, have engaged in an unlawful and corrupt conspiracy among themselves in restraint of said trade and commerce in refined sugar among the several States of the United States; that is to say, a conspiracy unreasonably to restrain and eliminate free competition, and prevent all competition, with said corporation defendant, in such trade and commerce, by said Pennsylvania Sugar Refining Company, to the very great injury and detriment, financial and moral, of the people of the United States, and this by and through the unfair, deceitful, unlawful and corrupt means and practices on the part of said corporation and individual defendants which are now here described:

First. One Adolph Segal, of said city of Philadelphia, being on said thirtieth day of December, in the year nineteen hundred and three, the treasurer of the Champion Construction Company, a corporation, and the owner and holder of a majority of its capital stock, and said Champion Construction Company being the owner and holder of a majority, to wit, twenty-six thousand out of a total of fifty thousand of the shares of the capital stock of said Pennsylvania Sugar Refining Company, and said Adolph Segal therefore being the virtual owner and holder of a controlling interest in the stock of said Pennsylvania Sugar Refining Company; and said corporation and individual defendants then having knowledge of said facts pertaining to said Adolph Segal's said stock ownership in and control of
10 said Champion Construction Company and Pennsylvania Sugar Refining Company, said corporation and individual defendants were to get from said Champion Construction Company, through said Adolph Segal, for said corporation defendant, the possession, use and control of, and the authority to vote, said shares of capital stock in, and thereby secure the power of control over and management of, said Pennsylvania Sugar Refining Company for the term of one year at least, to be accomplished by inducing said Adolph Segal to borrow, for the term of one year from the fourth day of the then next succeeding month of January, from said Gustav E. Kissel, acting as a broker and as the agent for a lender whose identity was not to be by him or any of said defendants disclosed to said Adolph Segal, but which lender was in fact to be said corporation defendant, a large sum of money, to wit, of the sum of twelve hundred and fifty thousand dollars, at six per cent interest, for use in his business as a promoter of hotel and manufacturing enterprises, and to transfer to said Gustav E. Kissel, together with other security for the repayment of said sum of money, written authority to exercise the power of voting as a holder of said twenty-six thousand shares of stock of said Pennsylvania Sugar Refining Company, without said

Adolph Segal being aware of the fact that said corporation defendant would be the real lender of such sum of money to him, and without his suspecting the designs of said corporation and individual defendants in the premises, or having reason to suppose that such undisclosed lender would have any other desire but one to obtain the interest upon and the repayment of such sum when due, or any motive for preventing said Pennsylvania Sugar Refining Company from carrying on its said intended business, trade, and commerce, and thereby earning profits and paying dividends to its stock-
11 holders in such a way as to enable said Adolph Segal to pay such interest and repay such principal sum so to be borrowed; it being a fact, as the grand jurors aforesaid, upon their oath aforesaid, charge it to be, that, as said corporation and individual defendants then well knew, said Adolph Segal would be dependent upon such dividends for moneys with which to pay such interest and repay such borrowed sum and, in the event of said Pennsylvania Sugar Refining Company's failure to carry on its said business, trade, and commerce and pay such dividends, his financial affairs would be put in a ruinous condition, and the hold of said corporation defendant upon him and upon said Pennsylvania Sugar Refining Company, by reason of such his obligations to said corporation defendant, continued and greatly strengthened.

Second. When the power of control over and management of said Pennsylvania Sugar Refining Company should so be acquired by said corporation defendant for the term of one year in the manner aforesaid, said corporation and individual defendants were to use every means in their power to extend said term and said power of control, particularly by keeping said Adolph Segal involved in debt and his affairs in such a condition as to prevent his relieving himself from his obligations to said corporation defendant, and by wrongfully and arbitrarily refusing to accept payment of such obligations from him, either before or at their maturity, or to surrender to him such power of control over and management of said Pennsylvania Sugar Refining Company.

Third. When the power of control over and management of said Pennsylvania Sugar Refining Company should be so acquired by said corporation and individual defendants in the manner
12 aforesaid, said corporation and individual defendants were to make use of the same to prevent said Pennsylvania Sugar Refining Company from engaging in or carrying on, in whole or in part, the business, trade, and commerce which it was so organized for carrying on, and had so prepared to carry on, and so intended to carry on, as aforesaid; and were thereby to bring about the ruin of said Pennsylvania Sugar Refining Company through inaction, and the destruction of its said property and facilities through decay, and eliminate and entirely prevent the competition with said corporation defendant which would, but for the acts of said corporation and individual defendants in the premises, come into existence through the operation of said Pennsylvania Sugar Refining Company.

OVERT ACTS.

1. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that in pursuance of said unlawful and corrupt conspiracy, and to effect the object of the same, said Gustav E. Kissel during said period of six years, to wit, on said thirtieth day of December, in the year nineteen hundred and three, at said borough of Manhattan, in said city and southern district of New York, unlawfully did sign his name to wit, Gustav E. Kissel, to, and execute, and procure said Adolph Segal to execute, a certain written agreement, that is to say, an agreement which, with such signatures, then was and now is of the tenor following:

"Agreement made December thirtieth, nineteen hundred and three (1903), by and between Adolph Segal, herein called the borrower, and Gustav E. Kissel, as agent, his principals and their assigns,
13 being herein called the lenders, witnesseth:

"Whereas, the borrower desires to borrow one million two hundred and fifty thousand dollars ($1,250,000) from the lenders upon the terms and conditions hereof and of a stock note to be given therefor, of which the following is a copy:

"'$1,250,000. NEW YORK.

"'Twelve months after date, for value received, I promise to pay to Gustav E. Kissel, agent, or his assigns, one million two hundred and fifty thousand dollars ($1,250,000), with interest at six per cent per annum, payable quarterly on April 2d, July 2d, October 2d, and January 2d, having deposited with him as collateral security for payment of this or any other liability or liabilities to his principals or their assigns, due or to become due, or that may be hereafter contracted, the following property, to wit:

"'One thousand first mortgage bonds of $1,000 each of the Majestic Apartment House Co., Philadelphia; five hundred first mortgage bonds of $1,000 each of the Pennsylvania Sugar Refining Company; receipt of Frank K. Hipple for twenty-six thousand (26,000) shares of the capital stock of the Pennsylvania Sugar Refining Company, the right to the stock and all voting and other rights which belong to it, with full power and authority, in case of the non-payment of the said sum of money at maturity, or of either or any of the instalments of interest as they shall become payable, to sell the whole or
14 any part of such securities at any broker's board or at public or private sale, at his or their option, at any time or times thereafter without advertisement or notice to me, and with the right on his or their part to become purchasers thereof at such sale or sales freed and discharged of any equity of redemption, and after deducting all legal or other costs and expenses for collection, sale and delivery, to apply the residue of the proceeds of such sale or sales so made to pay the said indebtedness, or so much thereof as shall remain unpaid, and whether due or to become due, returning the overplus, if any, to the undersigned, and I will still remain liable for any amount

unpaid. This note, with the securities, may be transferred by the said Gustav E. Kissel, agent, his principals, or by his or their assigns, the holder at any time to have all the rights herein conferred upon him and them, with no remaining or continuing liability of the transferrer.'

"And whereas, a substantial part of the security therefor consists in the said five hundred (500) $1,000 bonds of the Pennsylvania Sugar Refining Company, and the right to the said twenty-six thousand (26,000) shares of the stock of that company, and the voting and other powers which belong to that stock, the borrower hereby covenanting that the same has been regularly issued as full paid stock and constitutes a majority of all the stock of the Company, with the control thereby given.

"Now, therefore, the parties have agreed, and they hereby do agree, as follows:

"1. The borrower, that the said bonds of the Majestic Apartment House Co. are the entire issue of such bonds, and that they are
15 secured by a first mortgage of the property known as the Majestic apartment house in Philadelphia; that the borrower will furnish to the lenders a policy of title insurance issued by the Real Estate Trust Company of Philadelphia insuring the title to the property as free and clear of and from all prior liens and incumbrances, and insuring the validity of the mortgage as legally executed to be a first lien thereon.

"2. The borrower, as the Majestic apartment house is not yet completed, agrees that the lenders may retain and withhold two hundred thousand dollars ($200,000) of the said loan, to be paid over in monthly instalments of fifty thousand dollars ($50,000), each, upon certificates by the architect that the amount has, in addition to all previous payments, been expended upon the property, the last fifty thousand dollars ($50,000) not to be paid over until the Majestic apartment house is fully completed, free from all claims for taxes, mechanic's liens, claims by contractor, and other claims whatsoever, such two hundred thousand dollars ($200,000) to be deposited in the U. S. Mortgage and Trust Company of New York, to remain until the borrower, shall be entitled to receive the same or shall be in default, he to have the trust company interest thereon, in case of any default the lenders to be entitled to a return of so much of the same as shall remain and to allow for the same.

"3. The borrower agrees that the entire issue of first mortgage bonds of the Pennsylvania Sugar Refining Company is three
16 million dollars ($3,000,000) and no more, consisting in three thousand bonds, each of one thousand dollars ($1,000); the said five hundred bonds (500) being one-sixth of the total authorized issue, and that such issue is secured by a first mortgage of the property of the Pennsylvania Sugar Refining Company; that the borrower will furnish the lenders a policy of title insurance issued by the Real Estate Trust Company of Philadelphia, insuring the title to the property as free and clear of all prior liens and incumbrances,

and insuring the validity of the mortgage as legally executed so as to be a first lien thereon.

"4. The borrower agrees that he will so arrange that the absolute voting power for the said twenty-six thousand (26,000) shares of the stock of the Pennsylvania Sugar Refining Company shall be in the lenders; that the lenders shall have the right to use such voting power as may be suitable to aid or effectuate the purposes hereof; and as the control thereby given is a material part of the consideration for the said note, the borrower further agrees that he will so arrange that, of the seven directors of the said Pennsylvania Sugar Refining Company, four to be nominated by the lenders, of whom one shall be the said Gustav E. Kissel, shall be put in place of four of the present directors, that they, or substitutes to be nominated by the lenders, shall be directors so long as any part of the loan shall remain unpaid; that the control and possession of the property of the said the Pennsylvania Sugar Refining Company shall be in such way and so
17 effectu*a*lly subjected to the control of the board of directors that so long as the note, or any part thereof, remains unpaid, the refinery of the said the Pennsylvania Sugar Refining Company shall only be run or operated or do business as shall be directed by such board of directors; any expense caused by the possession of the property, or in carrying out this agreement on the part of the lenders, to be added to the said note and to be entitled to the security and to the benefit of all the provisions on the part of the borrower therein contained with like effect as if the same had been specially mentioned therein.

"5. The borrower may pay the said note with unpaid interest to time of payment at any time after October 1st, 1904, and not before.

"6. The lenders agree that upon compliance with the foregoing provisions on the part of the borrower they will, upon the terms herein, and in the said note contained, make the said loan.

"In witness whereof the parties hereto have hereunto set their hands and seals the day and year first above written.

"ADOLPH SEGAL. [SEAL.]
"GUSTAV E. KISSEL, *Agent.* [SEAL.]"

2. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of said unlawful and corrupt conspiracy, and to effect the object of the same, said Thomas B. Harned afterwards, to wit, on said thirtieth day of December, in the year nineteen hundred and three, at said city of Philadelphia,
18 in said State of Pennsylvania, unlawfully did sign his name, to wit, Thomas B. Harned, to, and execute, as president of the Champion Construction Company, a corporation, a certain document in writing, to wit, a document which with such signature, then was and now is of the tenor following:

"DECEMBER 30, 1903.

"The Champion Construction Company hereby consents and agrees that the 26,000 shares of the capital stock of the Pennsylvania

Sugar Refining Company, mentioned in the foregoing papers, shall be used as therein provided.

"THE CHAMPION CONSTRUCTION COMPANY,
"THOMAS B. HARNED, *President.*
"ADOLPH SEGAL, *Treasurer.* [SEAL.]
"WM. H. WHITESIDE, *Secretary.*"

3. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of said unlawful and corrupt conspiracy, and to effect the object of the same, said Thomas B. Harned afterwards, to wit, on said thirtieth day of December, in the year nineteen hundred and three, at Philadelphia aforesaid, unlawfully did sign his name, to wit, Thomas B. Harned, to a certain power of attorney, to wit, a written power of attorney which, with such signatu[illegible] then was and now is of the tenor following:

"Know all men by these presents, that the undersigned, being the owner of 26,000 shares of the capital stock of the Pennsylvania Sugar Refining Company, do hereby constitute and appoint Gustav
19 E. Kissel its true and lawful attorney, in its name and stead, to vote upon the stock owned by it or standing in its name, as its proxy at any and all meetings of the stockholders of the said company, hereby granting the said attorney full power and authority to act for it and in its name at the said meeting or meetings, in voting for directors of the said company or otherwise, and in the transaction of such other business as may properly come before the meeting, as fully as it could do if acting under its proper officers, with full power of substitution and revocation, hereby ratifying and confirming all that my said attorney or substitute may do in its place, name, and stead. This proxy is irrevocable pending the life of a certain agreement bearing even date herewith between A. Segal and said Kissel.

"In witness whereof this proxy is executed by direction of the board of directors of the Champion Construction Company, under the seal of said company, duly signed by its president and secretary this 30th day of December, 1903.

"CHAMPION CONSTRUCTION COMPANY,
"By THOMAS B. HARNED, *President.*

"Attest:
"WM. H. WHITESIDE, *Secretary.*"

4. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of said unlawful and corrupt conspiracy, and to effect the object of the same, said Gustav E. Kissel afterwards, to wit, on said thirtieth day of December, in the year nineteen hundred and three, at Philadelphia aforesaid,
20 unlawfully did attend a meeting of the board of directors of said Pennsylvania Sugar Refining Company, and as such director did vote in favor of and so secure the adoption of a resolution of the said board to the effect that said Pennsylvania Sugar Refining

Company should thereafter refrain from carrying on its business until the further order of said board of directors.

5. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of said unlawful and corrupt conspiracy and to effect the object of the same said Arthur Donner afterwards, to wit, on the thirty-first day of December, in the same year, nineteen hundred and three, at said borough of Manhattan, in said city and Southern District of New York, unlawfully did sign his name, to wit, Arthur Donner, to, and execute as treasurer of the American Sugar Refining Company, a certain check, to wit, a check of the tenor following:

This check is issued in payment of

No. 49821 JERSEY CITY, N. J. *Dec 31 1903*
250000

First National Bank of Jersey City, N. J.

Pay to the order of Gustav E. Kissel Two hundred & fifty thousand # Dollars

THE AMERICAN SUGAR REFINING CO.
$250.000# per ARTHUR DONNER *Treasurer.*

Payable through New York Clearing House.

6. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of said unlawful and corrupt conspiracy, and to effect the object of the same, said Gustav E. Kissel afterwards, to wit, on said thirty-first day of December, in the year nineteen hundred and three, at said Borough of Manhattan, in said city and Southern District of New York, unlawfully did write and sign his name to a certain receipt, to wit, a receipt of the tenor following:

21

NEW YORK *Dec 31" 1903*

Received from The American Sugar Refining Company Two hundred & fifty thousand dollars ($250000.) to be applied on account of loan of $1250000. made to A. Segal by me, as agent, under a contract dated Dec. 30" 1903, it being understood that I am to use said sum only upon delivery to me of

$2,600000. Penn. Sugar Refinery stock trust certificate
250000. " " " 1st Mtg 5% bonds
250000. Majestic Appartment House 1st Mtg 5% bonds

GUSTAV E. KISSEL.

7. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of said unlawful and corrupt conspiracy, and to *the* effect the object of the same, The American Sugar Refining Company aforesaid afterwards, to wit, on the fourth day of January, in the year nineteen hundred and four, at

said Borough of Manhattan, in said city and Southern District of New York, unlawfully did draw three certain checks, to wit, one check of the tenor following:

22

This check is issued in payment of

No. 49836 JERSEY CITY, N. J. *Jan 4 1904*

First National Bank of Jersey City, N. J.

Pay to the order of Gustav E. Kissel Two hundred & fifty thousand # Dollars

THE AMERICAN SUGAR REFINING CO.

$250,000# per C. R. HEIKE *Secretary.*

Payable through New York Clearing House.

Another check of the tenor following:

This check is issued in payment of

No. 2972 NEW YORK, *Jan 4 1904*

The Bank of New York National Banking Association

Pay to the order of Gustav E. Kissel Two hundred & fifty thousand # Dollars

THE AMERICAN SUGAR REFINING COMPANY OF NEW YORK.

$250,000# per C. R. HEIKE *Treasurer.*

23 And another check of the tenor following:

This check is issued in payment of

No. 5444 NEW YORK, *Jan 4 1904*

National City Bank in New York City.

Pay to the order of Gustav E. Kissel Five hundred thousand # Dollars

THE AMERICAN SUGAR REFINING COMPANY OF NEW YORK.

$500,000# per C. R. HEIKE *Treasurer.*

8. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of said unlawful and corrupt conspiracy, and to effect the object of the same, said Gustav E. Kissel afterwards, to wit, on said fourth day of January, in the year nineteen hundred and four, at said Borough of Manhattan, in said city and Southern District of New York, unlawfully did write and sign a certain other receipt, to wit, a receipt of the tenor following:

NEW YORK *Jan 4" 1904*

Received from the American Sugar Refinery Co. One million dollars ($1000000) to be applied on account of loan of $1,250,000.— made to A. Segal by me as agent, under contract dated Dec 30" 1903 is being understood that I am to use said sum only upon delivery to me of the securities specified in said contract—

GUSTAV E. KISSEL

9. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of said unlawful and corrupt conspiracy, and to effect the object of the same, said Gustav E. Kissel afterwards, to wit, on said fourth day of January, in the year nineteen hundred and four, at said Borough of Manhattan, in said city and Southern District of New York, unlawfully did sign his name, to wit, Gustav E. Kissel, to a certain statement of account, to wit, a typewritten statement of account, which, with such signature, then was and now is of the tenor following:

GUSTAV E. KISSEL,
34 Nassau Street, New York, January 4th, 1904.

A. SEGAL, Esq.,

DEAR SIR: The amount of principal on my loans to you, due today, together with interest to date, is $610,606.66—arrived at as follows:

Loan of Dec. 22nd—	$120.000	
13 days at 6% on $60.000	130	
12 " " 6% " 60,000	120	$120,250.
Loan of Dec. 30th—	180,000	
5 days at 6%	150	180,150.
Loan of Dec. 31st—	310,000.00	
4 days at 6%	206.66	310,206.66
		$610,606.66

Yours very truly,

GUSTAV E. KISSEL.

10. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of said unlawful and corrupt conspiracy, and to effect the object of the same, said Gustav E. Kissel afterwards, to wit, on said fourth day of January, in the year nineteen hundred and four, at said Borough of Manhattan, in said city and Southern District of New York, unlaw-

fully did sign his name, to wit, Gustav E. Kissel, to a certain letter in two places, to wit, a typewritten letter which, with such signatures then was and now is, of the tenor following:

GUSTAV E. KISSEL,
34 Nassau Street, New York, January 4th, 1904.

AMERICAN SUGAR REFINING COMPANY:

DEAR SIRS: The transaction with Mr. Adolph Segal having been closed this day, I beg herewith to enclose, for your reference, copy of contract executed between Adolph Segal and G. E. Kissel, agent, and to report that I hold the following documents and securities for your account:

1. Contract dated December 30th, 1903, between Adolph Segal and G. E. Kissel.
2. Note of Adolph Segal for $1,250,000, as described in contract.
3. $2,600,000 Pennsylvania Sugar Refining Co. stock.
4. $500,000 Pennsylvania Sugar Refinery first mortgage 5% bonds.
5. $750,000 Majestic apartment house of Philadelphia first mortgage 5% bonds.
6. $250,000 underlying mortgage on Majestic apartment house formerly owned by me; this mortgage is to be satisfied of record
26 to-morrow and cancelled, and the Real Estate Trust Company of Philadelphia, who are trustees under the mortgage, will then give to me the remaining $250,000 Majestic Hotel bonds which they hold in the interim.
7. Copy of the minutes of directors' meeting of the Pennsylvania Sugar Refining Co., at which Mess. Kissel, Walter D. Robinson, George L. Twigg, and Morris J. Werner were elected directors and resolution concerning the closing of the refinery was passed, certified as a correct copy by the secretary.
8. Letter from Thomas B. Harned, president, relative to voting of stock.
9. Letter from W. Ramsey, president of the Sugar Refining Company, stating that he will follow the instructions of a majority of the board of directors.
10. Letter from Frank K. Hipple, president of the Real Estate Trust Company, stating that he can exercise no rights concerning the voting of the stock which he holds as trustee.
11. Irrevocable proxy for 26,000 shares of the capital stock of the Pennsylvania Sugar Refining Company.

Yours, truly,

GUSTAV E. KISSEL.

As the 1,500 bonds are voluminous, I have rented safe No. 2588 in the National Safe Deposit Company, of New York, 32 Liberty street, where the above-mentioned securities and papers now are.

GUSTAV E. KISSEL.

11. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of said unlawful and corrupt conspiracy, and to effect the object of the same, The American Sugar Refining Company aforesaid afterwards, to wit, on the fifth day of January, in the year nineteen hundred and four, at said Borough of Manhattan, in said city and Southern District of New York, unlawfully did cause to be written a certain letter, to wit, a letter of the tenor following:

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NEW YORK, *January 5th, 1904.*

G. E. KISSEL, Esq.

DEAR SIR: Referring to the loan made by you as agent for us to Mr. Segal under the agreement of December 30th, 1903, we will hold you harmless by reason of the execution of that agreement and of any action taken under it. It is understood, however, that in this transaction any services which have been rendered by you are for Mr. Segal and that you must obtain your compensation from him and that you are not to look to us. We wish you to have this clearly understood by Mr. Segal and would prefer that he express the understanding in writing.

Yours, very truly,

THE AMERICAN SUGAR REFINING CO.,
H. O. HAVEMEYER, *Prest.*

12. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of said unlawful and corrupt conspiracy, and to effect the object of the same, said Arthur Donner, Charles H. Senff, George H. Frazier, and John E. Parsons afterwards, to wit, on the twenty-third day of May, in the year nineteen hundred and five, at said Borough of Manhattan, in said city and Southern District of New York, unlawfully did attend a meeting of the executive committee of the board of directors of The American Sugar Refining Company aforesaid.

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13. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of said unlawful and corrupt conspiracy, and to effect the object of the same, said Washington B. Thomas, Arthur Donner, Charles H. Senff, and John Mayer afterwards, to wit, on the thirteenth day of February, in the year nineteen hundred and seven, at said Borough of Manhattan, in said city and Southern District of New York, unlawfully did attend a meeting of the board of directors of The American Sugar Refining Company aforesaid, and at such meeting did each vote for and thereby secure the adoption of certain resolutions to the effect following:

"*Resolved*, That in accordance with the resolution passed by the stockholders at their last annual meeting, the secretary, in the name of and for the company, send to the president a letter giving to him a copy of the resolution of the stockholders in reference to proceedings in the Segal matter, asking him to cooperate in defending

against any such proceedings: and agreeing as to him that the company assumes the entire responsibility of what has occurred in the Segal matter; and that it will defend, protect, and indemnify him, and in the event of a suit and possible recovery, that it will either pay the same, or if an appeal shall be taken, that it will stay proceedings and secure and, if and when required, make payment.

"*Resolved*, That in accordance with the resolution passed by the stockholders at their last annual meeting, the secretary, in
29 the name of and for the company, send to Mr. John E. Parsons, the counsel of the company, a letter giving to him a copy of the resolution of the stockholders in reference to proceedings in the Segal matter; asking him to cooperate in defending against any such proceedings; and agreeing as to him that the company assumes the entire responsibility of what has occurred in the Segal matter; and that it will defend, protect, and indemnify him; and in the event of a suit and possible recovery, that it will either pay the same, or if an appeal shall be taken, that it will stay proceedings and secure and, if and when required, make payment."

14. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of said unlawful and corrupt conspiracy, and to effect the object of the same, said John E. Parsons afterwards, to wit, on the fifteenth day of February, in the year nineteen hundred and seven, at said Borough of Manhattan, in said city and Southern District of New York, unlawfully did sign his name, to wit, Jno. E. Parsons, to a certain letter, to wit, a letter which then and there was, and is, of the tenor following:

PARSONS, CLOSSON & MCILVAINE,
52 William Street, New York, February 15th, 1907.

Mr. C. R. HEIKE, *Secretary*,
117 Wall Street.

DEAR SIR:

Segal.

30 I am in receipt of yours of February 14th enclosing resolution passed by the directors of The American Sugar Refining Company at their meeting on February 13th, 1907, for which accept my thanks.

For some reason which is not clear to me, Mr. Earle has delayed proceedings. The Department of Justice ought to refuse, and I hope that it will refuse, to aid Mr. Earle's claim. Mr. Johnson describes the claim as "farcical." However this may be, I shall, both on the company's account and on my own, cooperate in defending any proceedings which may be taken by Mr. Earle.

Yours, truly,

JNO. E. PARSONS.

15. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of said unlawful and corrupt conspiracy, and to effect the object of the same, said Gustav E. Kissel afterwards, to wit, on the third day of May, in the year nineteen hundred and seven, at said Borough of Manhattan, in said city and Southern District of New York, unlawfully did sign his name, to wit, Gustav E. Kissel, to a certain other letter, to wit, a typewritten letter which, with his said signature, then was and now is of the tenor following:

(Members New York Stock Exchange. Cable address "Kiskin," New York.)

KISSEL, KINNICUTT & CO.,
37 Wall Street, New York, May 3d, 1907.

THE AMERICAN SUGAR REFINING CO.

DEAR SIRS: I beg herewith to send you vouchers for the 31 following expenditures chargeable to you in connection with the loan made to Adolph Segal by me as your agent:

American Sugar Refining Co. to Gustav E. Kissel, Dr.

1904.	National Safe Deposit Co., of New York:	
Jan. 16.	Rent of vault, Dec. 31/03 to June 30/04	$50.00
June 30.	" " " June 30 to Dec. 31/04	50.00
1905.		
June 17.	" " " Dec. 30/04 to June 30/05	50.00
Dec. 23.	" " " June 30/05 to Dec. 30/05	50.00
1906.		
June 21.	" " " Dec. 30/05 to June 30/06	50.00
Dec. 8.	" " " June 30 to Dec. 30/06	50.00
Feb. 28.	Expenses of Mr. W. D. Robinson, trip to Phila., to demand payment of 3,000 Majestic coupons	6.00
Mar. 23.	Expressage on coupons of Penna. Sugar bonds sent to Philadelphia for payment	2.50
Jan. 3.	Cravath, Henderson & DeGersdorff (legal services in connection with loan)	250.00
Mar. 25.	Retainer paid to Mr. John G. Johnson, through Morgan & Lewis	100.00
Apr. 25.	Retainer paid to Mr. Howard Taylor	1,000.00
		$1,658.50

for which I beg you to have the kindness to send me check, as I am starting for Europe on May 15th.

Yours, very truly, GUSTAV E. KISSEL.

16. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of said unlawful and corrupt conspiracy, and to effect the object of the same, The American Sugar Refining Company aforesaid, corporation as aforesaid, afterwards, to wit, on the tenth day of May, in the year nineteen hundred and seven, at said Borough of Manhattan, in said city and Southern District of New York, unlawfully did settle and pay a certain claim and account of said Gustav E. Kissel against it, to wit, the claim and account, in the total sum of $1,658.50, shown in the letter set forth according to its tenor in "Overt act" No. 15 in this indictment.

32 17. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of said unlawful and corrupt conspiracy, and to effect the object of the same, said Washington B. Thomas, Arthur Donner, Charles H. Senff, George H. Frazier, John Mayer, and John E. Parsons afterwards, to wit, on the twelfth day of November, in the year nineteen hundred and seven, at said Borough of Manhattan, in said city and Southern District of New York, unlawfully did attend a meeting of the Directors of The American Sugar Refining Company aforesaid.

18. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of said unlawful and corrupt conspiracy, and to effect the object of the same, said John E. Parsons, afterwards, to wit, on the nineteenth day of April, in the year nineteen hundred and nine, at said Borough of Manhattan, in said city and Southern District of New York, unlawfully did sign his name, to wit, Jno. E. Parsons, to a certain letter, to wit, a letter which then and there was, and is, of the tenor following:

APRIL 19TH, 1909.

Mr. C. R. HEIKE, Esq.,
117 Wall Street.

DEAR SIR: I will send the advertisement about the Pennsylvania Sugar Refining Company bonds to Mr. Johnson. He has the matter in charge. With the bonds held by Mr. Kissel I should think that we represented so considerable a holding as to make it undesirable to submit the bonds to the action of a probably hostile commit-
33 tee. Should any action be required, I will let you know.

Yours, truly,

JNO. E. PARSONS.

And so the grand jurors aforesaid, upon their oath aforesaid, do say, that said The American Sugar Refining Company, Washington B. Thomas, Arthur Donner, Charles H. Senff, John Mayer, George H. Frazier, John E. Parsons, Thomas B. Harned, and Gustav E. Kissel, at and within said Southern District of New York, throughout the period of three years next preceding the finding and presentation of this indictment, in manner and form aforesaid, unlawfully have engaged in a conspiracy in restraint of trade and commerce in refined sugar among the several States; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

SECOND COUNT.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said corporation and individual defendants named in the first count of this indictment, to wit, The American Sugar Refining Company, corporation as aforesaid, Washington B.

Thomas, Arthur Donner, Charles H. Senff, John Mayer, George H. Frazier, John E. Parsons, Thomas B. Harned, and Gustav E. Kissel, individuals, in and by engaging, during the period of time in the same count specified, and in the manner and under the circumstances and conditions there described, in the unlawful and corrupt conspiracy in that count mentioned, and in and by the committing, at the several times and places in that behalf mentioned, of the several overt acts, in pursuance and to effect the object of said conspiracy,
34 in said first count set forth, unlawfully have knowingly and corruptly monopolized a part of the trade and commerce among the several States, to wit, the interstate trade and commerce in refined sugar; against the peace and dignity of the United States and contrary to the form of the statute of the same in such case made and provided.

THIRD COUNT.

And the grand jurors aforesaid, upon their oath aforesaid, do further present that said corporation and individual defendants named in the first count of this indictment, to wit, The American Sugar Refining Company, corporation as aforesaid, Washington B. Thomas, Arthur Donner, Charles H. Senff, John Mayer, George H. Frazier, John E. Parsons, Thomas B. Harned, and Gustav E. Kissel, individuals, in and by engaging, during the period of time in the same count specified, and in the manner and under the circumstances and conditions there described, in the unlawful and corrupt conspiracy in that count mentioned, and in and by the committing, at the several times and places in that behalf mentioned, of the several overt acts, in pursuance and to effect the object of said conspiracy, in said first count set forth, unlawfully have knowingly and corruptly attempted to monopolize a part of the trade and commerce among the several States, to wit, the interstate trade and commerce in refined sugar, against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

FOURTH COUNT.

And the grand jurors aforesaid, upon their oath aforesaid, do further present that said corporation and individual defend-
35 ants named in the first count of this indictment, to wit, The American Sugar Refining Company, corporation as aforesaid, Washington B. Thomas, Arthur Donner, Charles H. Senff, John Mayer, George H. Frazier, John E. Parsons, Thomas B. Harned, and Gustav E. Kissel, individuals, in and by engaging, during the period of time in the same count specified, and in the manner and under the circumstances and conditions there described, in the unlawful and corrupt conspiracy in that count mentioned, and in and by the committing, at the several times and places in that behalf mentioned, of the several overt acts, in pursuance and to effect the object of said

conspiracy, in said first count set forth, unlawfully have each knowingly and corruptly conspired with the others to monopolize a part of the trade and commerce among the several States, to wit, the interstate trade and commerce in refined sugar; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

FIFTH COUNT.

And the grand jurors aforesaid, upon their oath aforesaid, do further present that for six years and upwards prior to the day of the finding and presentation of this indictment, The American Sugar Refining Company, hereafter in this indictment called corporation defendant, has been, and now is, a corporation organized and existing under and by authority of the laws of the State of New Jersey, with its principal offices at No. 117 Wall street, in the Borough of Manhattan, in the city of New York, and in said Southern District of New York; and that Washington B. Thomas, Arthur Donner, Charles H. Senff, John Mayer, George H. Frazier, and John E. Parsons, each late of said borough, city, and district, have been respectively directors of said corporation, and together have
36 controlled and managed its affairs, said John E. Parsons also being its general counsel and said Arthur Donner its treasurer.

And the grand jurors aforesaid, upon their oath aforesaid, do further present that throughout the period of time aforesaid The American Sugar Refining Company aforesaid has carried on, among others, the business of purchasing raw sugar and molasses in the markets of the States of the United States where the same has been exclusively produced from the soil, to wit, Louisiana and Texas, and causing such raw sugar and molasses to be shipped from those markets to its refinery situated in Jersey City, in the State of New Jersey, as raw materials for the manufacture of refined sugar—there being no such raw materials produced from the soil of said State of New Jersey, and such refined sugar being an article of prime necessity to and used in enormous quantities by the people of the United States; and that in so carrying on in the manner aforesaid the business in this count of this indictment described said corporation defendant has been, and is now, engaged in trade and commerce among the several States of this Union within the meaning of the act of Congress approved July 2, 1890, and entitled "An act to protect trade and commerce against unlawful restraints and monopolies"; and, further, that of the total volume of such interstate business, trade, and commerce in raw sugar and molasses which has been carried on during the period aforesaid by said corporation defendant and by its competitors, said corporation defendant has had and controlled the principal part, that is to say, ninety per centum thereof.

And the grand jurors aforesaid, upon their oath aforesaid, do further present that throughout said period of six years the Penn-
37 sylvania Sugar Refining Company has been, and now is, a corporation organized and existing under and by authority of the

laws of the State of Pennsylvania; that said Pennsylvania Sugar Refining Company was organized and created and has existed for the purpose of carrying on, to the extent of its capacity and in competition with said corporation defendant, the same business, trade, and commerce, except as to volume and place of manufacture, as that in this count of this indictment before described as the business, trade, and commerce of said corporation defendant; that said Pennsylvania Sugar Refining Company, early in said period, to wit, on the thirtieth day of December, in the year nineteen hundred and three, having, by the expenditure of a large sum of money, to wit, the sum of two millions of dollars, acquired the necessary grounds for and erected an extensive sugar-manufacturing plant at the city of Philadelphia, in the State of Pennsylvania, and provided the necessary facilities for so doing, was about to engage in and carry on, and intended to engage in and carry on, said business, trade, and commerce in raw sugar and molasses, in accordance with said purpose of its organization, creation, and existence, and throughout the remainder of said period would so have carried on said business, trade, and commerce, if it had not been for the unlawful and corrupt conduct of said corporation defendant, of its said directors, and of certain other individual defendants hereinafter named, which is now to be described.

And the grand jurors aforesaid, upon their oath aforesaid, do further present that The American Sugar Refining Company aforesaid, corporation defendant as aforesaid, said Washington B. Thomas, Arthur Donner, Charles H. Senff, John Mayer, George H.
38 Frazier, John E. Parsons, and one Thomas B. Harned and one Gustav E. Kissel, in this indictment hereafter called individual defendants, on said thirtieth day of December, in the year nineteen hundred and three, and continuously and at all times during said period of six years, to wit, from that day until and on the day of the finding and presentation of this indictment, each then well knowing all the premises in this indictment aforesaid, in violation of the provisions of section one of said act of Congress, have engaged in an unlawful and corrupt conspiracy among themselves in restraint of said trade and commerce in the purchase and sale of raw sugar and molasses, among the several States of the United States; that is to say, a conspiracy unreasonably to restrain and eliminate free competition and prevent all competition with said corporation defendant in such last-mentioned trade and commerce by said Pennsylvania Sugar Refining Company, to the very great injury and detriment, financial and moral, of the people of the United States—and this by and through the unfair, deceitful, unlawful, and corrupt means and practices on the part of said corporation and individual defendants which are now here described:

First. One Adolph Segal, of said city of Philadelphia, being, on said thirtieth day of December, in the year nineteen hundred and three, the treasurer of the Champion Construction Company, a corporation, and the owner and holder of a majority of its capital stock, and said Champion Construction Company being the owner and

holder of a majority, to wit, twenty-six thousand out of a total of fifty thousand, of the shares of the capital stock of said Pennsylvania Sugar Refining Company, and said Adolph Segal therefore being the virtual owner and holder of a controlling interest in the stock of said Pennsylvania Sugar Refining Company; and said corporation and individual defendants then having knowledge of said facts pertaining to said Adolph Segal's said stock ownership in and control of said Champion Construction Company and Pennsylvania Sugar Refining Company, said corporation and individual defendants were to get from said Champion Construction Company, through said Adolph Segal, for said corporation defendant, the possession, use, and control of, and the authority to vote, said shares of capital stock in, and thereby secure the power of control over and management of, said Pennsylvania Sugar Refining Company for the term of one year at least, to be accomplished by inducing said Adolph Segal to borrow, for the term of one year from the fourth day of the then next succeeding month of January, from said Gustav E. Kissel, acting as a broker and as the agent for a lender whose identity was not to be by him or any of said defendants disclosed to said Adolph Segal, but which lender was in fact to be said corporation defendant, a large sum of money, to wit, of the sum of twelve hundred and fifty thousand dollars, at six per cent interest, for use in his business as a promoter of hotel and manufacturing enterprises, and to transfer to said Gustav E. Kissel, together with other security for the repayment of said sum of money, written authority to exercise the power of voting as a holder of said twenty-six thousand shares of stock of said Pennsylvania Sugar Refining Company, without said Adolph Segal being aware of the fact that said corporation defendant would be the real lender of such sum of money to him, and without his suspecting the designs of said corporation and individual defendants in the premises, or having reason to suppose that such undisclosed lender would have any other desire but one to obtain the interest upon and the repayment of such sum when due, or any motive for preventing said Pennsylvania Sugar Refining Company from carrying on its said intended business, trade, and commerce, and thereby earning profits and paying dividends to its stockholders in such a way as to enable said Adolph Segal to pay such interest and repay such principal sum so to be borrowed; it being a fact, as the grand jurors aforesaid, upon their oath aforesaid, charge it to be, that, as said corporation and individual defendants then well knew, said Adolph Segal would be dependent upon such dividends for moneys with which to pay such interest and repay such borrowed sum, and in the event of said Pennsylvania Sugar Refining Company's failure to carry on its said business, trade, and commerce and pay such dividends his financial affairs would be put in a ruinous condition, and the hold of said corporation defendant upon him and upon said Pennsylvania Sugar Refining Company, by reason of such his obligations to said corporation defendant, continued and greatly strengthened.

Second. When the power of control over and management of said Pennsylvania Sugar Refining Company should so be acquired by said corporation defendant for the term of one year in the manner aforesaid, said corporation and individual defendants were to use every means in their power to extend said term and said power of control, particularly by keeping said Adolph Segal involved in debt and his affairs in such a condition as to prevent his relieving himself from his obligations to said corporation defendant, and by wrongfully and arbitrarily refusing to accept payment of such obligations from him, either before or at their maturity, or to surrender to him such power of control over and management of said Pennsylvania Sugar Refining Company.

41 Third. When the power of control over and management of said Pennsylvania Sugar Refining Company should be so acquired by said corporation and individual defendants in the manner aforesaid, said corporation and individual defendants were to make use of the same to prevent said Pennsylvania Sugar Refining Company from engaging in or carrying on, in whole or in part, the business, trade and commerce which it was so organized for carrying on, and had so prepared to carry on, and so intended to carry on, as in this count aforesaid; and were thereby to bring about the ruin of said Pennsylvania Sugar Refining Company through inaction, and the destruction of its said property and facilities through decay, and eliminate and entirely prevent the competition with said corporation defendant in the purchase and interstate shipment of raw sugar and molasses which would, but for the acts of said corporation and individual defendants in the premises, come into existence through the operation by said Pennsylvania Sugar Refining Company of its manufacturing plant in this count mentioned.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that in pursuance of the unlawful and corrupt conspiracy in this count mentioned and described, and to effect the object of that conspiracy, said corporation and individual defendants, during said period of six years, to wit, at the several times in that behalf in said first count specified under the caption of "Overt acts," unlawfully did do and commit the several overt acts in said first count charged against them under said caption of "Overt acts."

And so the grand jurors aforesaid, upon their oath aforesaid, do say, that said The American Sugar Refining Company, Washington B. Thomas, Arthur Donner, Charles H. Senff, John

42 Mayer, George H. Frazier, John E. Parsons, Thomas B. Harned, and Gustav E. Kissel, at and within said Southern District of New York, throughout the period of three years next preceding the finding and presentation of this indictment, in manner and form in this count of this indictment aforesaid, unlawfully have engaged in a conspiracy in restraint of trade and commerce, in the purchase and shipment of raw sugar and molasses, among the several

States; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

SIXTH COUNT.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said corporation and individual defendants named in the fifth count of this indictment, to wit, The American Sugar Refining Company, corporation as aforesaid, Washington B. Thomas, Arthur Donner, Charles H. Senff, John Mayer, George H. Frazier, John E. Parsons, Thomas B. Harned, and Gustav E. Kissel, individuals, in and by engaging, during the period of time in the same count specified, and in the manner and under the circumstances and conditions there described, in the unlawful and corrupt conspiracy in that count mentioned, and in and by the committing, at the several times and places in that behalf mentioned, of the several overt acts, in pursuance and to effect the object of said conspiracy, in the first count of this indictment set forth, unlawfully have knowingly and corruptly monopolized a part of the trade and commerce among the several States, to wit, the interstate trade and commerce in the purchase and shipment of raw sugar and molasses; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

43 SEVENTH COUNT.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said corporation and individual defendants named in the fifth count of this indictment, to wit, The American Sugar Refining Company, corporation as aforesaid, Washington B. Thomas, Arthur Donner, Charles H. Senff, John Mayer, George H. Frazier, John E. Parsons, Thomas B. Harned, and Gustav E. Kissel, individuals, in and by engaging, during the period of time in the same count specified, and in the manner and under the circumstances and conditions there described, in the unlawful and corrupt conspiracy in that count mentioned, and in and by the committing, at the several times and places in that behalf mentioned, of the several overt acts, in pursuance and to effect the object of said conspiracy, in the first count of this indictment set forth, unlawfully have knowingly and corruptly attempted to monopolize a part of the trade and commerce among the several States, to wit, the interstate trade and commerce in the purchase and shipment of raw sugar and molasses; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

EIGHTH COUNT.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said corporation and individual defendants

named in the fifth count of this indictment, to wit, The American Sugar Refining Company, corporation as aforesaid, Washington B. Thomas, Arthur Donner, Charles H. Senff, John Mayer, George H. Frazier, John E. Parsons, Thomas B. Harned, and Gustav E. Kissel, individuals, in and by engaging, during the period of time in
44 the same count specified, and in the manner and under the circumstances and conditions there described, in the unlawful and corrupt conspiracy in that count mentioned, and in and by the committing, at the several times and places in that behalf mentioned, of the several overt acts, in pursuance and to effect the object of said conspiracy, in the first count of this indictment set forth, unlawfully have each knowingly and corruptly conspired with the others to monopolize a part of the trade and commerce among the several States, to wit, the interstate trade and commerce in the purchase and shipment of raw sugar and molasses; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

NINTH COUNT.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that for six years and upwards prior to the day of the finding and presentation of this indictment, The American Sugar Refining Company, hereafter in this indictment called corporation defendant, has been, and now is, a corporation organized and existing under and by authority of the laws of the State of New Jersey, with its principal offices at No. 117 Wall street, in the Borough of Manhattan, in the city of New York, and in said Southern District of New York; and that Washington B. Thomas, Arthur Donner, Charles H. Senff, John Mayer, George H. Frazier, and John E. Parsons, each late of said borough, city, and district, have been respectively directors of said corporation, and together have controlled and managed its affairs, said John E. Parsons also being its general counsel and said Arthur Donner its treasurer.

45 And the grand jurors aforesaid, upon their oath aforesaid, do further present, that throughout the period of time aforesaid, The American Sugar Refining Company aforesaid, has carried on, among others, the business of purchasing raw sugar and molasses in certain foreign countries, to wit, Cuba, Java, and Borneo, and causing such raw sugar and molasses to be shipped to its refinery situated in Jersey City, in the State of New Jersey, as raw materials for the manufacture of refined sugar—there being no such raw materials produced from the soil of said State of New Jersey, and such refined sugar being an article of prime necessity to, and used in enormous quantities by, the people of the United States; and that in so carrying on in the manner aforesaid the business in this count of this indictment described, said corporation defendant has been, and is now, engaged in trade and commerce with foreign nations within the meaning of the act of Congress approved July 2, 1890, and en-

titled "An act to protect trade and commerce against unlawful restraints and monopolies;" and, further, that of the total volume of such foreign business, trade, and commerce in raw sugar and molasses which has been carried on, during the period aforesaid, by said corporation defendant and by its competitors, said corporation defendant has had and controlled the principal part, that is to say, ninety per centum thereof.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that throughout said period of six years the Pennsylvania Sugar Refining Company has been, and now is, a corporation organized and existing under and by authority of the laws of the State of Pennsylvania; that said Pennsylvania Sugar Refining Company was organized and created and has existed for the purpose of carrying on, to the extent of its capacity and in competition
46 with said corporation defendant, the same business, trade, and commerce, except as to volume and place of manufacture, as that in this count of this indictment before described as the business, trade and commerce of said corporation defendant; that said Pennsylvania Sugar Refining Company, early in said period, to wit, on the thirtieth day of December, in the year nineteen hundred and three, having, by the expenditure of a large sum of money, to wit, the sum of two millions of dollars, acquired the necessary grounds for and erected an extensive sugar manufacturing plant at the city of Philadelphia, in the State of Pennsylvania, and provided the necessary facilities for so doing, was about to engage in and carry on, and intended to engage in and carry on, said business, trade, and commerce in raw sugar and molasses, in accordance with said purpose of its organization, creation and existence, and throughout the remainder of said period would so have carried on said business, trade, and commerce, if it had not been for the unlawful and corrupt conduct of said corporation defendant, of its said directors, and of certain other individual defendants, hereinafter named, which is now to be described.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that The American Sugar Refining Company aforesaid, corporation defendant as aforesaid, said Washington B. Thomas, Arthur Donner, Charles H. Senff, John Mayer, George H. Frazier, John E. Parsons, and one Thomas B. Harned, and one Gustav E. Kissel, in this indictment hereafter called individual defendants, on said thirtieth day of December, in the year nineteen hundred and three, and continuously and at all times during said period of six years, to wit, from that day until and on the day of the
47 finding and presentation of this indictment, each then well knowing all the premises in this count of this indictment aforesaid, in violation of the provisions of section one of said act of Congress, have engaged in an unlawful and corrupt conspiracy among themselves in restraint of said trade and commerce with foreign nations in the purchase and shipment of raw sugar and molasses; that is to say, a conspiracy unreasonably to restrain and eliminate free

competition, and prevent all competition with said corporation defendant, in such last-mentioned trade and commerce, by said Pennsylvania Sugar Refining Company, to the very great injury and detriment, financial and moral, of the people of the United States—and this by and through the unfair, deceitful, unlawful, and corrupt means and practices on the part of said corporation and individual defendants which are now here described:

First. One Adolph Segal, of said city of Philadelphia, being, on said thirtieth day of December, in the year nineteen hundred and three, the treasurer of the Champion Construction Company, a corporation, and the owner and holder of a majority of its capital stock, and said Champion Construction Company being the owner and holder of a majority, to wit, twenty-six thousand out of a total of fifty thousand, of the shares of the capital stock of said Pennsylvania Sugar Refining Company, and said Adolph Segal therefore being the virtual owner and holder of a controlling interest in the stock of said Pennsylvania Sugar Refining Company; and said corporation and individual defendants then having knowledge of said facts pertaining to said Adolph Segal's said stock ownership in and control of said Champion Construction Company and Pennsylvania Sugar
48 Refining Company, said corporation and individual defendants were to get from said Champion Construction Company, through said Adolph Segal, for said corporation defendant, the possession, use and control of, and the authority to vote, said shares of capital stock in, and thereby secure the power of control over and management of, said Pennsylvania Sugar Refining Company for the term of one year at least—to be accomplished by inducing said Adolph Segal to borrow, for the term of one year from the fourth day of the then next succeeding month of January, from said Gustav E. Kissel, acting as a broker and as the agent for a lender whose identity was not to be by him or any of said defendants disclosed to said Adolph Segal, but which lender was in fact to be said corporation defendant, a large sum of money, to wit, of the sum of twelve hundred and fifty thousand dollars, at six per cent interest, for use in his business as a promoter of hotel and manufacturing enterprises, and to transfer to said Gustav E. Kissel, together with other security for the repayment of said sum of money, written authority to exercise the power of voting as a holder of said twenty-six thousand shares of stock of said Pennsylvania Sugar Refining Company, without said Adolph Segal being aware of the fact that said corporation defendant would be the real lender of such sum of money to him, and without his suspecting the designs of said corporation and individual defendants in the premises, or having reason to suppose that such undisclosed lender would have any other desire but one to obtain the interest upon and the repayment of such sum when due, or any motive for preventing said Pennsylvania Sugar Refining Company from carrying on its said intended business, trade, and commerce and thereby earning profits and paying dividends to its stockholders in such a way as to enable said Adolph Segal to pay such interest

49 and repay such principal sum so to be borrowed; it being a fact, as the grand jurors aforesaid, upon their oath aforesaid, charge it to be, that, as said corporation and individual defendants then well knew, said Adolph Segal would be dependent upon such dividends for moneys with which to pay such interest and repay such borrowed sum, and, in the event of said Pennsylvania Sugar Refining Company's failure to carry on its said business, trade, and commerce and pay such dividends, his financial affairs would be put in a ruinous condition, and the hold of said corporation upon him and upon said Pennsylvania Sugar Refining Company, by reason of such his obligations to said corporation defendant, continued and greatly strengthened.

Second. When the power of control over and management of said Pennsylvania Sugar Refining Company should so be acquired by said corporation defendant for the term of one year in the manner aforesaid, said corporation and individual defendants were to use every means in their power to extend said term and said power of control, particularly by keeping said Adolph Segal involved in debt and his affairs in such a condition as to prevent his relieving himself from his obligations to said corporation defendant, and by wrongfully and arbitrarily refusing to accept payment of such obligations from him, either before or at their maturity, or to surrender to him such power of control over and management of said Pennsylvania Sugar Refining Company.

Third. When the power of control over and management of said Pennsylvania Sugar Refining Company should be so acquired by said corporation and individual defendants in the manner aforesaid, said corporation and individual defendants were to make use of the same to prevent said Pennsylvania Sugar Refining Company from
50 engaging in or carrying on, in whole or in part, the business, trade, and commerce which it was so organized for carrying on, and had so prepared to carry on, and so intended to carry on, as in this count aforesaid; and were thereby to bring about the ruin of said Pennsylvania Sugar Refining Company through inaction and the destruction of its said property and facilities through decay, and eliminate and entirely prevent the competition with said corporation defendant in the purchase and interstate shipment of raw sugar and molasses which would, but for the acts of said corporation and individual defendants in the premises, come into existence through the operation by said Pennsylvania Sugar Refining Company of its manufacturing plant in this count mentioned.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that in pursuance of the unlawful and corrupt conspiracy in this count mentioned and described, and to effect the object of that conspiracy, said corporation and individual defendants during said period of six years, to wit, at the several times in that behalf in said first count specified under the caption of "Overt acts," unlawfully did do and commit the several overt acts in said first count charged against them under said caption of "Overt acts."

And so the grand jurors aforesaid, upon their oath aforesaid, do say that said The American Sugar Refining Company, Washington B. Thomas, Arthur Donner, Charles H. Senff, John Mayer, George H. Frazier, John E. Parsons, Thomas B. Harned, and Gustav E. Kissel at and within said Southern District of New York, throughout the period of three years next preceding the finding and presentation of this indictment, in manner and from in this count of this indictment aforesaid, unlawfully have engaged in a conspiracy in re-
51 straint of trade and commerce in the purchase and shipment of raw sugar and molasses with foreign nations; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

TENTH COUNT.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said corporation and individual defendants named in the ninth count of this indictment, to wit, The American Sugar Refining Company, corporation as aforesaid, Washington B. Thomas, Arthur Donner, Charles H. Senff, John Mayer, George H. Frazier, John E. Parsons, Thomas B. Harned, and Gustav E. Kissel, individuals, in and by engaging during the period of time in the same count specified, and in the manner and under the circumstances and conditions there described, in the unlawful and corrupt conspiracy in that count mentioned, and in and by the committing at the several times and places in that behalf mentioned, of the several overt acts, in pursuance and to effect the object of said conspiracy, in said first count set forth, unlawfully have knowingly and corruptly monopolized a part of the trade and commerce with foreign nations, to wit, the trade and commerce in the purchase and shipment of raw sugar and molasses; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

ELEVENTH COUNT.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said corporation and individual defendants named in the ninth count of this indictment, to wit, The American Sugar
52 Refining Company, corporation as aforesaid, Washington B. Thomas, Arthur Donner, Charles H. Senff, John Mayer, George H. Frazier, John E. Parsons, Thomas B. Harned, and Gustav E. Kissel, individuals, in and by engaging, during the period of time in the same count specified, and in the manner and under the circumstances and conditions there described, in the unlawful and corrupt conspiracy in that count mentioned, and in and by the committing at the several times and places in that behalf mentioned, of the several overt acts, in pursuance and to effect the object of said conspiracy, in said first count set forth, unlawfully have knowingly and corruptly attempted to monopolize a part of the trade and commerce with foreign nations,

to wit, the trade and commerce in the purchase and shipment of raw sugar and molasses; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

TWELFTH COUNT.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said corporation and individual defendants named in the ninth count of this indictment, to wit, The American Sugar Refining Company, corporation as aforesaid, Washington B. Thomas, Arthur Donner, Charles H. Senff, John Mayer, George H. Frazier, John E. Parsons, Thomas B. Harnard, and Gustav E. Kissel, individuals, in and by engaging, during the period of time in the same count specified, and in the manner and under the circumstances and conditions there described, in the unlawful and corrupt conspiracy in that count mentioned, and in and by the committing, at the several times and places in that behalf mentioned, of the several overt
53 acts, in pursuance and to effect the object of said conspiracy, in said first count set forth, unlawfully have each knowingly and corruptly conspired with the others to monopolize a part of the trade and commerce with foreign nations, to wit, the trade and commerce in the purchase and shipment of raw sugar and molasses; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

THIRTEENTH COUNT.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said corporation and individual defendants named in the first, fifth, and ninth counts of this indictment, to wit, The American Sugar Refining Company, corporation as aforesaid, Washington B. Thomas, Arthur Donner, Charles H. Senff, John Mayer, George H. Frazier, John E. Parsons, Thomas B. Harned, and Gustav E. Kissel, individuals, in and by engaging, during the period of time in those counts specified, and in the manner and under the circumstances and conditions in said counts described, in the several unlawful and corrupt conspiracies in those counts mentioned, and in and by the committing, at the several times and places in that behalf mentioned, of the several overt acts, in pursuance and to effect the object of said several conspiracies, which are in said first count set forth, in violation of section one of said act of Congress, unlawfully have knowingly and corruptly engaged in a conspiracy among themselves in restraint of trade and commerce among the several States and with foreign nations, to wit, the interstate and foreign trade and commerce in the purchase and shipment of the materials, to wit, raw sugar and molasses, for manufacturing refined sugar, and the interstate trade and commerce in refined sugar manufactured
54 from such materials; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

FOURTEENTH COUNT.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said corporation and individual defendants named in the first count of this indictment, to wit, The American Sugar Refining Company, corporation as aforesaid, Washington B. Thomas, Arthur Donner, Charles H. Senff, John Mayer, George H. Frazier, John E. Parsons, Thomas B. Harned, and Gustav E. Kissel, individuals, in and by doing, during the period of time in the same count specified, and in the manner and under the circumstances and conditions in the first, fifth, and ninth counts of this indictment described, of the several things in those counts charged against them, and in and by the committing, at the several times and places in that behalf mentioned, of the several overt acts in said first count set forth, in violation of section two of said act of Congress, unlawfully have knowingly and corruptly monopolized, and attempted to monopolize, and conspired to monopolize, a part of the trade and commerce among the several States and with foreign nations, to wit, the interstate and foreign trade and commerce in the purchase and shipment of the materials, to wit, raw sugar and molasses, for manufacturing refined sugar, and the interstate trade and commerce in refined sugar manufactured from such materials; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

HENRY A. WISE,
United States Attorney.
JOHN W. H. CRIM,
Assistant United States Attorney.

55 (Endorsed:) U. S. Circuit Court. The United States of America vs. American Sugar Refining Company and others. Indictment under sections I & II, Sherman anti-trust law (act of July 2, 1890). Henry A. Wise. A true bill. J. Lawrence Aspinwall, foreman. U. S. Circuit Court, Southern District N. Y. Filed Jul. 1, 1909. John A. Shields, clerk. 1909, July 16. Defendants Thomas, Donner, Senff, Frazier, Parsons, Kissel, Harned, and American Sugar Ref. Co. plead not guilty with leave to withdraw July 20, 1909. July 19, Mayer pleads not guilty. July 19, filed stipulation adjourning time to withdraw plea, etc., to Aug. 31, 1909. July 29, Deft. Kissel withdraws plea of not guilty. July 29, filed plea in bar, Kissel. Aug. 3, Deft. Harned withdraws plea of not guilty. Aug. 3, filed plea in bar, Harned. Sept. 22, filed demurrer to Deft. Kissel's first plea. Sept. 22, filed demurrer to plea. Sept. 22, filed demurrer to Harned plea. Sept. 30, filed joinder in demurrer. Oct. 26, filed opinion, Holt, J. (on demurrers to pleas in bar). Nov. 9, filed order and judgment. Nov. 27, motion for re-settlement of judgment. Nov. 27, filed order re-settling order of judgment and judgment.

56 *Pleas in bar by defendant Kissel.*

United States Circuit Court, Southern District of New York.

THE UNITED STATES OF AMERICA *versus* GUSTAV E. KISSEL, IMPLEADED WITH THE AMERICAN Sugar Refining Company, Washington B. Thomas, Arthur Donner, Charles H. Senff, John Mayer, George H. Frazier, John E. Parsons, and Thomas B. Harned, defendants.	Pleas in bar.

And now, on this day, comes into court the above-named defendant Gustav E. Kissel, in his own proper person and by counsel, and having heard read the indictment against him in the above-entitled proceeding found on the first day of July, one thousand nine hundred and nine, says that the United States ought not further to prosecute said indictment against him because of the following matters and things which he pleads in bar of its prosecution for any and all the alleged offenses therein charged, and he respectfully avers as follows, to wit:

First. For a first and separate plea to each and every of the counts in said indictment contained this defendant avers:

57 I. That the alleged offenses charged against this defendant in said indictment, and in each and every count thereof, are barred by the provisions of section one thousand and forty-four of the Revised Statutes of the United States of America, in that said indictment was not found within three years next after the offenses therein alleged, or any of them, were committed.

II. That the said indictment against this defendant was found on the first day of July, in the year one thousand nine hundred and nine, and that more than three years had then elapsed between the commission of the offenses therein alleged, and each of them, and the finding of said indictment.

III. That for more than three years next preceding said first day of July, one thousand nine hundred and nine, this defendant did not directly or indirectly do any act or thing whatsoever in aid or furtherance of or to effect or tending to effect the object of any conspiracy or conspiracies in restraint of trade or commerce among the several States or with foreign nations alleged in the several counts of said indictment; that within said period of three years he was not a member of and did not engage, participate, or take part in any such conspiracy or conspiracies; that the acts and things alleged in said indictment to have been done within said period of three years, whether by him or by others, were not acts or things in aid or furtherance of or to effect or tending to effect the object of any such conspiracy or conspiracies, and that the alleged overt acts and things averred in said indictment to have been done by others within three years next preceding the finding of said indictment, being alleged therein as overt acts Nos. 13, 14, 17 and 18, to wit,

"(1) That certain of the defendants named in said indict-
58 ment attended as directors a meeting of the board of directors of The American Sugar Refining Company on the thirteenth day of February, one thousand nine hundred and seven, at the Borough of Manhattan, in the city and Southern District of New York, and voted in favor and secured the adoption of certain resolutions in said indictment set forth, such resolutions being averred therein as 'Overt act' No. 13.

"(2) That the defendant John E. Parsons, at said borough, city, and district, signed his name to a certain letter dated New York, February 15, 1907, set forth in said indictment, to C. R. Heike, such letter being averred therein as 'Overt act' No. 14.

"(3) That certain of the defendants named in said indictment attended as directors a meeting of the directors of The American Sugar Refining Company on the twelfth day of November, one thousand nine hundred and seven, at said borough, city, and district, such attendance being averred in said indictment as 'Overt act' No. 17.

"(4) That the defendant John E. Parsons, at said borough, city, and district, signed his name to a certain letter dated April 19, 1909, set forth in said indictment, to C. R. Heike, such letter being averred therein as 'Overt act' No. 18,"

were each and all of them done without this defendant's participation, knowledge, consent, agreement, authority, or ratification.

IV. That heretofore, in the Court of Common Pleas No. 4 for the county of Philadelphia, being a court of record and of general jurisdiction in the State of Pennsylvania, in a certain suit brought by Edward C. Babcock against the Pennsylvania Sugar Refining Company, being the same corporation as is mentioned and described in said indictment, such proceedings were duly had that on the second
59 day of October one thousand nine hundred and six, said Court of Common Pleas duly entered an order appointing George H. Earle, of the city of Philadelphia, receiver of said company as an insolvent corporation and duly enjoined said company and its officers and agents from in any way intermeddling with or in any manner disposing of its assets and property, and duly confirmed said order on the sixth day of October, one thousand nine hundred and six, all as will more fully and at large appear by reference to the orders of said Court of Common Pleas, an exemplified copy of which will be produced on the hearing of this plea, and a copy of which is hereto annexed as Exhibit "A" and made part hereof, and that thereupon said Earle qualified as such receiver and duly took exclusive possession of all and singular the assets and property of said company and duly took exclusive charge and duly assumed exclusive control of all and singular its business affairs and choses in action and has ever since duly continued in such possession, charge, and control. That this defendant was not a party to and did not participate in the said action or in the said proceeding for the appointment of a receiver, and did not, directly or indirectly, procure, induce, counsel, advise, aid or abet the

institution of the said action, the appointment of the said receiver, or the making of the said orders, Exhibit "A."

V. That for more than three years next preceding said first day of July, one thousand nine hundred and nine, this defendant has not monopolized, or attempted to monopolize, or combined or conspired with any other person or persons to monopolize, and has not done any act or thing whatsoever to monopolize or tending to monopolize any part of the trade or commerce among the several States or with foreign nations.

60 VI. That for more than three years next preceding said first day of July, one thousand nine hundred and nine, this defendant did not directly or indirectly do any act or thing whatsoever in aid or furtherance of or to effect or tending to effect the object of any conspiracy or conspiracies to monopolize any part of the trade or commerce among the several States or with foreign nations alleged in the several counts of said indictment; that within said period of three years he was not a member of and did not engage, participate or take part in any such conspiracy or conspiracies; that the acts and things alleged in said indictment to have been done within said period of three years, whether by him or by others, were not acts or things in aid or furtherance of or to effect or tending to effect the object of any such conspiracy or conspiracies, and that the alleged overt acts and things averred in said indictment to have been done by others within three years next preceding the finding of said indictment, as aforesaid, were each and all of them done without this defendant's participation, knowledge, consent, agreement, authority, or ratification.

VII. That, at all the times mentioned in said indictment and until the present time, and at all times since the thirtieth day of December, one thousand nine hundred and three, this defendant was subject to the process of this court, and has been and still is an inhabitant and resident of the city of Morristown in the State of New Jersey, where he has resided with his family the greater part of the year; that at all such times he has been continuously engaged in business in the city of New York as a banker, and there present almost daily; that during the winter months of each year he has resided with his family

61 in his own house in the city and Southern District of New York; that at no time prior to or since said thirtieth day of December, one thousand nine hundred and three, did he leave his home and known place of abode except for temporary absences, and never with intent to avoid or flee from detection or punishment for any offense against the United States, and that at no time named in said indictment and at no time since the thirtieth day of December, one thousand nine hundred and three, has this defendant been a fugitive from justice or in any way or manner whatsoever been fleeing from justice within the intent and meaning of section 1045 of the Revised Statutes of the United States.

VIII. That this defendant is ready to verify and prove the foregoing facts as this court shall direct and award, and that therefore he

pleads the same in bar of any prosecution, trial, or punishment under said indictment, and says that to prosecute or punish him under said indictment or for any alleged offense charged therein or in any of the counts thereof would be to deny him the protection, privilege, and immunity of the statute of the United States in such case made and provided.

Second. For a second and separate plea to each and every of the counts in said indictment contained this defendant avers:

I. That heretofore and on or about the ninth day of March, one thousand nine hundred and seven, the Pennsylvania Sugar Refining Company, being the same corporation as is mentioned and described in said indictment, by and through George H. Earle, its receiver, duly appointed as such by the Court of Common Pleas No. 4 for the county of Philadelphia and State of Pennsylvania, by two orders duly
62 made and entered respectively on the second and sixth days of October, one thousand nine hundred and six, as appears by Exhibit "A," hereto annexed and made part hereof, brought a suit in this court, namely, the Circuit Court of the United States for the Southern District of New York, against this defendant and said The American Sugar Refining Company, Henry O. Havemeyer (since deceased), John E. Parsons, Walter D. Robinson, George L. Twigg, and Morris J. Werner; that said suit was authorized and directed to be commenced and prosecuted by said Court of Common Pleas, and that it was brought under and in pursuance of section seven of the act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies" (c. 647, 26 Stat., 209), and section seventy-three of the act of Congress of August 27, 1894, entitled "An act to reduce taxation, to provide revenue for the Government, and for other purposes" (c. 349, 28 Stat., 509), for the purpose of recovering the sum of thirty million dollars, such sum being averred in the complaint in said suit to be threefold the damages alleged to have been sustained by said Pennsylvania Sugar Refining Company from being injured in its business and property by the defendants in said civil suit by reason of all and singular the acts, doings, and things averred in said indictment, all as will more fully and at large appear by reference to the amended complaint in said suit filed in the office of the clerk of this court on the twenty-second day of November, one thousand nine hundred and seven, which will be produced on the hearing of this plea, and of which a true copy is hereto annexed as Exhibit "B" and made a part hereof.

II. That such proceedings were thereupon had in said suit
63 that the issues were joined therein by the answers of the several defendants, including this defendant, which answers duly denied the material allegations of the complaint; that said issues were duly noticed and set for trial in said Circuit Court of the United States for the Southern District of New York on the twenty-sixth day of May, one thousand nine hundred and nine, and that in contemplation of and preparation for said trial, the plaintiff, said Pennsyl-

vania Sugar Refining Company, duly caused to be issued in due form in the name and teste of the Honorable Melville W. Fuller, the Chief Justice of the United States, under the seal of this court and signed by the clerk of this court, and caused to be duly served upon this defendant, a subpœna duces tecum addressed to and commanding him to bring and produce at the trial of said suit in this court certain documentary evidence, including the following documents, to wit:

"(1) The original agreement between Adolph Segal and Gustav E. Kissel, dated December 30th, 1903, being the same agreement as is alleged and set forth in said indictment.

"(2) The original consent of the Champion Construction Company indorsed on said agreement between said Segal and Kissel, dated December 30th, 1903, being the same consent as is alleged and set forth in said indictment.

"(3) The original proxy of the Champion Construction Company to Gustav E. Kissel, constituting the said Kissel its true and lawful attorney to vote upon 26,000 shares of stock of the Pennsylvania Sugar Refining Company, owned by the Champion Construction Company, dated December 30th, 1903, being the same proxy as is alleged and set forth in said indictment.

* * * * * * *

"(15) All books of account, letters, and writings, showing the accounts between and the pecuniary transactions between Gustav
64 E. Kissel and The American Sugar Refining Company between October 1, 1903, and September 1, 1906, and all returned cheques, drafts, and other vouchers showing the payments made by the said The American Sugar Refining Company to the said Kissel and by the said Kissel to the said The American Sugar Refining Company during the said period, directly or indirectly."

all as will more fully and at large appear by reference to the original subpœna which will be produced on the hearing of this plea, and of which a true copy is hereto annexed as Exhibit "C" and made a part hereof.

III. That thereafter said suit so brought against this defendant and others duly came on for trial at a term of said court held in this district before the Honorable George C. Holt and a jury, and thereupon and on the twenty-sixth day of May, one thousand nine hundred and nine, and for numerous days thereafter, and, in due obedience to said subpœna duces tecum and in submission to its compulsion and not otherwise, this defendant attended personally in court and brought with him and produced all and singular the documentary evidence described in said subpœna duces tecum, including the documents above described, and which are the same documents referred to in said indictment against this defendant so found on the first day of July, one thousand nine hundred and nine.

IV. That upon the trial of said suit before said Honorable George C. Holt and a jury and on or about the twenty-seventh day of May, one thousand nine hundred and nine, the counsel for the plaintiff, said Pennsylvania Sugar Refining Company, called upon this de-

fendant, who was then in court in person, to produce in pur-
65 suance of and in obedience to said subpœna duces tecum, the original agreement dated December 30, 1903, between Adolph Segal, called the borrower, and Gustav E. Kissel, as agent, his principals and their assigns, called the lenders, being the original and the only original of the agreement of the same tenor, purport, and effect as that referred to and purporting to be set out at length in said indictment so found against this defendant as "Overt act" No. 1, and therein averred to have been done in order to effect the object of the alleged conspiracy or conspiracies.

V. That this defendant by and through his counsel then and there declined and refused to produce any documents under said subpœna duces tecum so served upon this defendant as aforesaid unless he was put on the stand and sworn to produce them, and by and through his counsel contended that the statute of the United States in such case made and provided required such papers to be produced under oath, and that this meant that this defendant should go upon the stand and be sworn to produce the documents; but the court held that it was not necessary that the witness be put on the stand or sworn in order to require him to produce the papers mentioned in said subpœna, and overruled the objection of this defendant, so made by and through his counsel, and ordered, directed, and compelled him and his counsel to produce the documents which this defendant had been subpœnaed to produce as aforesaid.

VI. That thereupon, in obedience to such ruling of said court and in submission to its compulsion and not otherwise, this defendant produced under said subpœna duces tecum the following documentary evidence, among others, which was offered and read in evidence
66 against him by the said plaintiff, The Pennsylvania Sugar Refining Company, on said trial of said civil suit, to wit:

"(1) The original of the contract in writing dated December thirtieth, on thousand nine hundred and three, between Adolph Segal, called the borrower, and this defendant, Gustav E. Kissel, as agent, his principals and their assigns, called the lenders, purporting to be a contract between the parties named for the loan of $1,250,000 on specified collateral security.

"(2) The original of the document in writing dated December thirtieth, one thousand nine hundred and three, signed by the defendant, Thomas B. Harned, as president of the Champion Construction Company, purporting to be the consent of said company.

"(3) The original of the document in writing dated December thirtieth, one thousand nine hundred and three, signed in the name of the Champion Construction Company by the defendant, Thomas B. Harned, as president, purporting to be a proxy from said company to this defendant, Gustav E. Kissel.

"(4) The original of the letter dated New York, January 5th, 1904, to this defendant, Gustav E. Kissel, from the American Sugar Refining Company, purporting to hold said defendant harmless by

reason of the execution of said agreement of December thirtieth, one thousand nine hundred and three, between himself and said Segal."

And that these are the originals and the only existing originals of the documents of the same tenor, purport, and effect referred to and purporting to be set out at length in said indictment so found against this defendant as "Overt acts" Nos. 1, 2, 3, and 11, respectively, and therein alleged to have been signed, executed and procured in order to effect the object of the alleged conspiracy or conspiracies.

67 VII. That this defendant is ready to verify and prove the foregoing facts as this court shall direct and award, and that, therefore, he pleads the same in bar of any prosecution, trial, or punishment under said indictment, and says that to prosecute or punish him under said indictment or for any alleged offense charged therein or in any of the counts thereof would be to deny him the protection, privilege, and immunity of the statutes of the United States in such case made and provided.

Wherefore this defendant, said Gustav E. Kissel, prays judgment that this honorable court, by its proper entry of record, may dismiss and discharge him from prosecution, trial, and punishment under said indictment so found on the first day of July, one thousand nine hundred and nine, and now pending in this court against him, and from prosecution and trial for the alleged offenses in said indictment or in any of the counts thereof charged against him.

New York, July 29, 1909.

GUSTAV E. KISSEL,
By WILLIAM C. OSBORN,
His Attorney.
(Office and post-office address, 71 Broadway, New York City.)

We hereby certify that the foregoing pleas in bar are not interposed for delay and that in our opinion they are well founded in point of law.

New York, July 29, 1909.

WILLIAM D. GUTHRIE,
WILLIAM C. OSBORN,
Of Counsel for Defendant Kissel.

68 EXHIBIT "A" TO PLEAS IN BAR.

BABCOCK
vs.
PENNSYLVANIA SUGAR REFINING COMPANY.

Decree.

And now, October 2nd, 1906, upon consideration of the injunction affidavit filed herewith, it is ordered, adjudged and decreed, that an injunction shall forthwith issue restraining the Pennsylvania Sugar Refining Company, its officers and agents, from intermeddling with or in any manner disposing of the books, money, assets and property

of the said company until the further order of the court in the premises, security for said injunction first to be entered in $5,000.

R. N. W.

The motion to continue the injunction will be heard on Saturday, October 6th, 1906.

It is further ordered that George H. Earle, jr., be and is hereby appointed receiver to take immediate possession of the books, papers, money, assets, choses in action and property of every description belonging to the said company, security to be entered by the said receiver in the sum of $200,000.00.

R. N. W.

69 BABCOCK *vs.* PENNSYLVANIA SUGAR Refining Company. | C. P. No. 4. September term, 1906. No. 1563.

And now, to wit, October 6th, 1906, this cause coming on to be heard, upon motion to continue the injunction upon the proofs presented and due consideration thereof, it is ordered, adjudged and decreed that the injunction heretofore granted be and the same is hereby continued until further order.

R. N. W.

70 EXHIBIT "B" TO PLEAS IN BAR.

Amended complaint.

Circuit Court of the United States, Southern District of New York.

PENNSYLVANIA SUGAR REFINING COMPANY, plaintiff, *against* THE AMERICAN SUGAR REFINING COMPANY, HENRY O. Havemeyer, John E. Parsons, Gustav E. Kissel, Walter D. Robinson, George L. Twigg, and Morris J. Werner, defendants.

The plaintiff above named, complaining of the defendants, by Battle & Marshall, its attorneys, respectfully shows to the court, on information and belief:

I. The plaintiff is, and at all the times hereinafter mentioned was, a corporation organized, existing and authorized under and by virtue of the laws of the State of Pennsylvania. At all said times the plaintiff had a total authorized capital stock of five million dollars ($5,000,000), divided into fifty thousand shares (50,000) of the par value of $100 each. All of said stock had been issued and was outstanding in the hands of various parties.

71 II. The defendant, The American Sugar Refining Company, is, and at all the times hereinafter mentioned was, a corporation duly organized, existing and authorized under and by virtue of

the laws of the State of New Jersey. The said defendant is, and at all said times was, engaged in the business of purchasing and importing into the United States raw sugar and other articles and materials from which refined sugar is in whole or part manufactured, and in manufacturing, refining, and selling refined sugar, molasses, melada, and other like products. Its principal place of business in the State of New Jersey is and was in Jersey City, and its principal place of business out of the State of New Jersey is in the city of New York. It is, and at all said times was, largely and extensively engaged in carrying on its aforesaid business in the States of New York, Pennsylvania, Louisiana, California, Maryland, Connecticut, and other States. It is and was engaged in the operation of large and valuable plants in various States of the United States, and at all said times owned and controlled the capital stock of various corporations incorporated in various States and engaged in the business of buying, manufacturing, refining, and selling sugar, molasses, and melada, and other like products. It was also at all of said times engaged largely in the business of importing from the State of Louisiana, and from other States adjoining the Gulf of Mexico into Pennsylvania and various of the other States of the United States, cane sugar and other articles and materials from which refined sugar is manufactured, for the purpose of refining and manufacturing the same, and in causing the said raw sugar and other materials and articles, as well as the refined sugar, molasses, melada, and
72 other products to be transported between the several States and exported to foreign countries for the purpose of trade and commerce. By reason of the aforesaid facts, the defendant, The American Sugar Refining Company, did at all said times control a very large and important part of the cane sugar refining business in and throughout the United States of America.

III. At all the time hereinafter mentioned the defendant, Henry O. Havemeyer, was a director and the president of the defendant. The American Sugar Refining Company, and the defendant John E. Parsons was a director and vice-president and general counsel of the said The American Sugar Refining Company.

IV. That the plaintiff's sole business and occupation from 1883 until it ceased in 1898 to do business as herein below alleged has been interstate and foreign trade and commerce, viz, purchasing in foreign countries and in the State of Louisiana and other States of the United States cane or raw sugar, molasses, and other articles and materials used and employed in the manufacture of sugar and other products; the importation and transportation of the same from the said places of purchase into the State of Pennsylvania; the manufacture in the State of Pennsylvania of sugar and such products from such raw sugar and other articles and materials; and the sale of the sugar and products so manufactured in and their transportation to the State of New Jersey and other States and foreign countries. That the purchase of the cane or raw sugar, molasses, and other articles and materials as aforesaid, and the importation and

transportation of the same into the State of Pennsylvania;
73 the manufacture thereof into sugar and products aforesaid and the sale and the transportation of the same from said State of Pennsylvania into various other States of the United States and foreign countries, were all and inseparably comprised in the plaintiff's said business and occupation. And said business and occupation could not be carried on without such importation of raw sugar, articles, and materials into the State of Pennsylvania, the manufacture and refining thereof, as aforesaid, and the sale in and transportation of the sugar therefrom to other States and foreign countries. That the importation of said raw material was the first step in plaintiff's said business, and without it such business could not be commenced or carried on, nor could its refinery run, be operated, or do business. That at the time and times of the commission of the acts and grievances herein complained of plaintiff was the owner of valuable property, consisting, among other things, of a tract of land in the city of Philadelphia, State of Pennsylvania, together with a wharf on the Delaware River, and together also with railroad sidings, stations, and other fixtures connected with various railway lines leading to the States of Delaware, New Jersey, New York, Maryland, Ohio, West Virginia, and other States. Upon said tract of land the plaintiff had built, erected, completed, and equipped, ready for use and operation, in the month of December, 1903, an enlarged sugar refinery in the place and stead of a smaller refinery theretofore, to wit, about the year 1883, erected upon said land, and thereafter and until the beginning of 1898 run, used, and operated by the plaintiff in carrying on its said business. That when the war between the United
74 States and Spain began in 1898, the plaintiff ceased the importation of raw sugar, molasses, and other products, and ceased manufacturing or refining the same in said smaller refinery and trading in the articles so imported, manufactured, or refined, and did not thereafter resume such importation, manufacturing, refining, or trading. Subsequently, and in the year 1901, the former refinery owned by the plaintiff was torn down to make room for the present refinery, the building of which was commenced in or about the year 1901 and was completed in the year 1903.

For the purpose of erecting the new refinery the plaintiff necessarily brought and imported into the State of Pennsylvania from some other State or States of the United States large quantities of material, machinery, and other articles and things necessary for the construction of said refinery, which importation commenced in the year 1901 and continued until the completion of the refinery in 1903. That it was the intention and purpose of the plaintiff to resume and continue its said business of sugar manufacturing in its said enlarged refinery and to resume and continue to purchase in the State of Louisiana and other States of the United States and in foreign countries cane sugar, molasses, and other articles and materials and to resume and continue to import the same therefrom into the State of Pennsylvania and there to refine and manufacture the same as

aforesaid, and to resume and continue to sell and export refined sugar and other products when so manufactured from its said refinery into the States of New York, Maryland, Ohio, West Virginia, New Jersey, Delaware, and other foreign States and to thereby compete and continue to compete with the defendant, The American Sugar Refining Company, which said defendant was and is engaged in the
75 same business as plaintiff as hereinbefore more fully set forth. No cane or raw sugar which are essential and basic articles for the refining and manufacture to which the plant and refinery of the plaintiff is and was alone adapted are, or at any time were or could be grown or raised or produced in the State of Pennsylvania.

V. Prior to and in the month of December, 1903, one Adolph Segal, of the city of Philadelphia and State of Pennsylvania, controlled a majority of the stock of a certain corporation known as the Champion Construction Company; and the said Champion Construction Company had in its possession and under its control twenty-six thousand (26,000) shares of the capital stock of the plaintiff, being more than a majority of the outstanding stock of the plaintiff.

VI. The defendant, Gustav E. Kissel, is and was, at all of the times herein mentioned, a banker and broker doing business in the city of New York.

VII. All of the facts hereinbefore stated and alleged were well known and believed throughout the said month of December, 1903, and thereafter by the defendant The American Sugar Refining Company, and by the defendant Henry O. Havemeyer, and by the defendant John E. Parsons, and by the defendant Gustav E. Kissel.

VIII. And then and thereupon, on or about the 1st day of December, 1903, and at divers times thereafter in the city, county, and State of New York, and in the city and county of Philadelphia and State of Pennsylvania, and at other places, the defendants above named, and each of them, unlawfully and with unlawful intent and
76 purpose combined, conspired, confederated, and agreed together, to and with each other, and with divers persons to the plaintiff unknown, to prevent and restrain the plaintiff from engaging in business that would be competitive with the business then and there conducted by the defendant, The American Sugar Refining Company, and to prevent and restrain the plaintiff from engaging in trade and commerce with divers planters and merchants in the Republic of Cuba and other foreign countries, and with divers planters and merchants in the State of Louisiana and in other States adjoining the Gulf of Mexico, and to prevent and restrain the plaintiff from purchasing cane sugar and other articles and materials from which refined sugar is manufactured, in the said places, and bringing the same into the State of Pennsylvania, to be there manufactured and refined, and to prevent and restrain the plaintiff from transporting refined sugar from the plant of the plaintiff in the State of Pennsylvania into the States of New York, New Jersey, Delaware, Maryland, and other States and countries; all with the unlawful purpose and intent aforesaid.

IX. The defendants, and each of them, did and performed, among other things, the various acts hereinafter more fully described and set forth, to wit:

(a) On or about the 30th day of December, 1903, the defendant Kissel, personally and acting as agent for The American Sugar Refining Company, and the defendant Havemeyer induced the said Adolph Segal to accept from him, the said Kissel, a loan of one million two hundred and fifty thousand dollars ($1,250,000), and obtained a written agreement from the said Adolph Segal, a copy of which
77 said agreement is hereto attached as a part hereof and marked "Exhibit A," and on the same date the said defendant Kissel obtained from the said Champion Construction Company a consent to the said agreement, a copy of which said consent is hereto annexed as a part hereof and marked "Exhibit B." The said Kissel, at the time of entering into said agreement with said Adolph Segal, not only concealed his said agency from said Segal, but expressly denied such agency to said Segal, who was thereby deceived, misled, and induced to enter into said agreement.

(b) The defendant Parsons supervised and assisted in the preparation of the said agreement, and suggested, advised, and arranged the means and methods by which the control of the voting power of the stock of the plaintiff and the control of the property of the plaintiff should be transferred to and vested in the defendant Kissel; and to that end prepared, drafted, and formulated various papers and documents, and prepared and suggested the form of resolutions hereinafter described to be adopted by the new directors, provided for in the fourth subdivision or paragraph of said agreement, "Exhibit A," hereto.

(c) The defendant, The American Sugar Refining Company, prior to the time when the said Kissel obtained from the said Segal the said agreement, dated December 30th, 1903, had authorized and directed and instructed the said Kissel to obtain the said agreement, and in obtaining the said agreement the said Kissel acted as the authorized agent of the defendant, The American Sugar Refining Company. And thereafter, on or about the 10th day of January, 1907, in Jersey City, New Jersey, the said defendant, The American Sugar Re-
78 fining Company, pursuant to a vote of its stockholders, agreed to defend, protect, and indemnify the defendant Havemeyer and the defendant Parsons against any action that might be brought against the said Parsons or the said Havemeyer by reason of the facts averred and set forth in this complaint, or by reason of other acts done by the said defendant Parsons and the said defendant Havemeyer, in furtherance of the agreement hereinbefore referred to.

(d) On the 30th day of December, 1903, and in the city of Philadelphia and State of Pennsylvania, the defendants Kissel, Robinson, Twigg, and Werner each accepted office as director of the plaintiff herein, the said four individuals having been elected directors in place of other directors who had resigned, pursuant to the provisions of the

said subdivision fourth of said contract "Exhibit A" annexed to the complaint herein.

(e) On the 30th day of December, 1903, and in the city of Philadelphia and State of Pennsylvania, the said defendants Kissel, Robinson, Twigg, and Werner, as directors of the plaintiff as aforesaid, adopted a resolution which had been theretofore, in whole or in part, prepared for their adoption by the defendant Parsons, requiring that the refinery and plant owned by the plaintiff, as aforesaid, should not be run, and that no proceedings looking to the commencement of operations of the plant of the plaintiff should be taken until the further order of the board of directors of the plaintiff. The said defendants, Kissel, Robinson, Twigg, and Werner, then and there constituted a majority of the board; which majority, under the law governing this corporation, constituted the quorum of said board, by reason whereof the said four defendants acquired and unlawfully and fraudu-
79 lently exercised the control of the corporation and thus hampered and controlled the discretion vested by the law in such board solely for the benefit of the corporation, and which could not be lawfully used for its harm.

(f) Throughout all of said period of time the defendant Havemeyer was aiding, abetting, conferring with and advising the other defendants, and was furnishing funds and obtaining funds from or for the defendant, The American Sugar Refining Company, with which to make the loan provided for and called for in the contract hereto annexed as "Exhibit A," and had prior to December 30, 1903, authorized and directed the said Kissel to obtain, make, and enter into said agreement, "Exhibit A."

(g) From the said 30th day of December, 1903, the defendants, and each and all of them, have continually thereafter kept the plant of the plaintiff from being operated, and have kept and restrained the plaintiff from engaging in business, trade, and commerce, and from transporting sugar and other articles and materials from which refined sugar is manufactured from foreign countries and from the State of Louisiana and other States adjoining the Gulf of Mexico into the State of Pennsylvania for manufacturing and refining, and have prevented and restrained the plaintiff and its directorate, in the manner aforesaid and through the control which had been obtained by the said defendants over the directorate and property of the said plaintiff, from engaging in trade and commerce and from sending sugar for sale from the State of Pennsylvania into the States of New York, Delaware, West Virginia, and other States, for the pur-
80 pose of competing with the said The American Sugar Refining Company, and from using a free and untrammelled discretion and judgment in said respects.

X. Each and all of said acts described in the last paragraph hereof were done and performed by the defendants and each of them in pursuance of the said combination, conspiracy, confederation, and agreement, and to effect the objects and purposes thereof, and with

the unlawful intent and purpose as hereinbefore alleged. No part of said sum of one million two hundred and fifty thousand dollars ($1,250,000), referred to in "Exhibit A" hereto annexed, was borrowed, received, or in any way used for the benefit of the plaintiff. The five hundred first mortgage bonds of the Pennsylvania Sugar Refining Company, referred to in said "Exhibit A," were part of an issue of bonds of the plaintiff herein, secured by a mortgage upon the property of the plaintiff hereinbefore described.

XI. By reason of all the foregoing facts and of the said unlawful combination, agreement, confederation, and conspiracy, the plaintiff has been greatly injured, both in its business and property, and the business of the plaintiff has been utterly destroyed and ruined, and the property of the plaintiff has been caused to deteriorate and depreciate in value, and plaintiff has been wholly deprived of the use of its property and of large profits which could and would have been made by the plaintiff had the plaintiff not been prevented and restrained, as aforesaid, from engaging in a competitive business with The American Sugar Refining Company and from the use of its property and from trade and commerce with the said States
81 other than the State of Pennsylvania, and with the said foreign countries; and from having a free and untrammelled discretion in said respects; and by reason of said facts and matters hereinbefore set forth the plaintiff has been injured in its business and property in the sum of ten million dollars ($10,000,000).

Wherefore, the plaintiff demands judgment against the defendants, and each of them, jointly and severally, for the sum of thirty million dollars ($30,000,000), pursuant to the provisions of the laws of the United States in such case made and provided, and demands judgment further against the said defendants, and each of them, jointly and severally, for the costs of this suit, including a reasonable attorney's fee.

BATTLE & MARSHALL,
Attorneys for Plaintiff, 37 Wall Street, New York City.

UNITED STATES OF AMERICA,
Southern District of New York, County of New York, ss.:

George Gordon Battle, being duly sworn, deposes and says that he is one of the attorneys for the plaintiff herein; that he has read the foregoing complaint and knows the contents thereof; that the same is true to his knowledge except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

That the reason why this verification is made by the deponent instead of by the plaintiff is that the plaintiff is a corporation
82 incorporated under the laws of the State of Pennsylvania; and that none of its officers are within this district, where deponent resides and has his place of business; and that the sources of deponent's information and the grounds of his belief are derived

from inspection of numerous documents and books and statements made to him by various persons.

GEO. GORDON BATTLE.

Sworn to before me this 22d day of November, 1907.

ROGER B. WOOD,
[SEAL.] *Notary Public, N. Y. Co.*

EXHIBIT "A."

Agreement made December thirtieth, nineteen hundred and three (1903), by and between Adolph Segal, herein called the borrower, and Gustav E. Kissel, as agent, his principals and their assigns, being herein called the lenders, witnesseth:

Whereas the borrower desires to borrow one million two hundred and fifty thousand dollars ($1,250,000) from the lenders upon the terms and conditions hereof and of a stock note to be given therefor, of which the following is a copy:

$1,250,000. NEW YORK.

Twelve months after date, for value received, I promise to pay to Gustav E. Kissel, agent, or his assigns, one million two hundred and fifty thousand dollars ($1,250,000), with interest at six per cent. per annum, payable quarterly on April 2nd, July 2nd, October 2nd,
83 and January 2nd, having deposited with him as collateral security for payment of this or any other liability or liabilities to his principals or their assigns, due or to become due, or that may be hereafter contracted, the following property, to wit:

One thousand first mortgage bonds of $1,000 each of the Majestic Apartment House Co., Philadelphia; five hundred first mortgage bonds of $1,000 each of the Pennsylvania Sugar Refining Company; receipt of Frank K. Hipple for twenty-six thousand (26,000) shares of the capital stock of the Pennsylvania Sugar Refining Company, the right to the stock and all voting and other rights which belong to it, with full power and authority, in case of the nonpayment of the said sum of money at maturity, or of either or any of the instalments of interest as they shall become payable, to sell the whole or any part of such securities at any broker's board or at public or private sale, at his or their option, at any times or times thereafter without advertisement or notice to me, and with the right on his or their part to become purchasers thereof at such sale or sales freed and discharged of any equity of redemption, and after deducting all legal or other costs and expenses for collection, sale and delivery, to apply the residue of the proceeds of such sale or sales so made to pay the said indebtedness, or so much thereof as shall remain unpaid, and whether due or to become due, returning the overplus, if any, to the undersigned, and I will still remain liable for any amount unpaid.

This note, with the securities, may be transferred by the said Gustav E. Kissel, agent, his principals, or by his or their assigns, the holder at any time to have all the rights herein conferred upon him and them, with no remaining or continuing liability of transferrer.

84 And whereas a substantial part of the security therefor consists in the said five hundred (500) $1,000 bonds of the Pennsylvania Sugar Refining Company, and the right to the said twenty-six thousand (26,000) shares of the stock of that company, and the voting and other powers which belong to that stock, the borrower hereby covenanting that the same has been regularly issued as full paid stock and constitutes a majority of all the stock of the company, with the control thereby given.

Now, therefore, the parties have agreed, and they hereby do agree, as follows:

1. The borrower, that the said bonds of the Majestic Apartment House Co. are the entire issue of such bonds, and that they are secured by a first mortgage of the property known as the Majestic Apartment House, in Philadelphia; that the borrower will furnish to the lenders a policy of title insurance issued by the Real Estate Trust Company of Philadelphia insuring the title to the property as free and clear of and from all prior liens and incumbrances, and insuring the validity of the mortgage as legally executed to be a first lien thereon.

2. The borrower, as the Majestic Apartment House is not yet completed, agrees that the lenders may retain and withhold two hundred thousand dollars ($200,000) of the said loan, to be paid over in monthly instalments of fifty thousand dollars ($50,000) each, upon certificates by the architect that the amount has, in addition to all previous payments, been expended upon the property, the last fifty thousand dollars ($50,000) not be paid over until the Majestic Apartment House is fully completed, free from all claims for

85 taxes, mechanics' liens, claims by contractor, and other claims whatsoever, such two hundred thousand dollars ($200,000) to be deposited in the U. S. Mortgage and Trust Company of New York, to remain until the borrower shall be entitled to receive the same or shall be in default, he to have the trust company interest thereon, in case of any default the lenders to be entitled to a return of so much of the same as shall remain and to allow for the same.

3. The borrower agrees that the entire issue of first mortgage bonds of the Pennsylvania Sugar Refining Company is three million dollars ($3,000,000), and no more, consisting in three thousand bonds, each of one thousand dollars ($1,000); the said five hundred bonds (500) being one-sixth of the total authorized issue, and that such issue is secured by a first mortgage of the property of the Pennsylvania Sugar Refining Company; that the borrower will furnish the lenders a policy of title insurance issued by the Real Estate Trust Company of Philadelphia, insuring the title to the property as free and clear of all prior liens and incumbrances, and insuring the va-

lidity of the mortgage as legally executed so as to be a first lien thereon.

4. The borrower agrees that he will so arrange that the absolute voting power for the said twenty-six thousand (26,000) shares of the stock of the Pennsylvania Sugar Refining Company shall be in the lenders; that the lenders shall have the right to use such voting power as may be suitable to aid or effectuate the purposes hereof; and as the control thereby given is a material part of the consideration for the said note, the borrower further agrees that he will so
86 arrange that, of the seven directors of the said Pennsylvania Sugar Refining Company, four to be nominated by the lenders, of whom one shall be the said Gustav E. Kissel, shall be put in place of four of the present directors, that they, or substitutes to be nominated by the lenders, shall be directors so long as any part of the loan shall remain unpaid; that the control and possession of the property of the said Pennsylvania Sugar Refining Company shall be in such way and so effectually subjected to the control of the board of directors that so long as the note, or any part thereof, remains unpaid, the refinery of the said the Pennsylvania Sugar Refining Company shall only be run or operated or do business as shall be directed by such board of directors; any expense caused by the possession of the property or in carrying out this agreement on the part of the lenders to be added to the said note and to be entitled to the security and to the benefit of all the provisions on the part of the borrower therein contained with like effect as if the same had been specially mentioned therein.

5. The borrower may pay the said note with unpaid interest to time of payment at any time after October 1st, 1904, and not before.

6. The lenders agree that upon compliance with the foregoing provisions on the part of the borrower they will, upon the terms herein, and in the said note contained, make the said loan.

In witness whereof, the parties hereto have hereunto set their hands and seals the day and year first above written.

GUSTAV E. KISSEL, *Agent.* [SEAL.]
ADOLPH SEGAL. [SEAL.]

87 EXHIBIT "B."

DECEMBER 30, 1903.

The Champion Construction Company hereby consents and agrees that the 26,000 shares of the capital stock of the Pennsylvania Sugar Refining Company, mentioned in the foregoing papers, shall be used as therein provided.

THE CHAMPION CONSTRUCTION COMPANY.
THOMAS B. HARNED, *President.*
ADOLPH SEGAL, *Treasurer.* [SEAL.]
WM. H. WHITESIDE, *Secretary.*

88 EXHIBIT "C" TO PLEAS IN BAR.

The President of the United States of America to Gustav E. Kissel, [L. S.] *37 Wall St. & Morristown, N. J., Greeting:*

We command you, That all business and excuses being laid aside, you appear and attend before the judges of the Circuit Court of the United States of America for the Southern District of New York, at a Circuit Court to be held at the U. S. Court building, in the city of New York, in and for the said district of New York, on the 26 day of May, 1909, at 11 o'clock in the forenoon, to testify and give evidence in a certain action now pending undetermined in the Circuit Court of the United States for the Southern District of New York, between Pennsylvania Sugar Refining Company, plaintiff, and The American Sugar Refining Company et als., defendants, on the part of the plaintiff, and that you bring with you and produce at the time and place aforesaid a certain

"(1) The original of a certain agreement between Adolph Segal and Gustav E. Kissel, dated December 30th, 1903.

"(2) The original consent of Champion Construction Company endorsed on said agreement between said Segal and Kissel, dated December 30th, 1903.

"(3) Proxy of Champion Construction Company to Gustav E. Kissel, constituting the said Kissel its true and lawful attorney to vote upon 26,000 shares of stock of the Pennsylvania Sugar Refining Company, owned by the Champion Construction Company, dated December 30th, 1903.

89 "(4) Original letter dated Philadelphia, Pa., December 30th, 1903, written by Frank K. Hipple, voting trustee, to Thomas B. Harned.

"(5) Original assignment and transfer by the Champion Construction Company to Gustav E. Kissel, or his assigns, of said last-named letter from said Frank K. Hipple, voting trustee, to Thomas B. Harned.

"(6) Original of a certain agreement between Adolph Segal and Gustav E. Kissel, of date February 1st, 1904, referring to the said agreement between said Segal and Kissel, dated December 30th, 1903.

"(7) Original of a certain agreement between Adolph Segal and Gustav E. Kissel, of date February 2d, 1904, referring to the said agreement between said Segal and Kissel, dated December 30th, 1903.

"(8) Two letters dated a few days prior to July 26th, 1905, from John E. Parsons to Gustav E. Kissel.

"(9) One letter dated on July 26th, 1905, from John E. Parsons to Gustav E. Kissel.

"(10) A letter dated on or a few days prior to May 15th, 1905, from John E. Parsons to Gustav E. Kissel.

"(11) Original letter from Adolph Segal to the defendant Kissel, dated on or about December 30th, 1903, containing an agreement to pay to the said Kissel $100,000 commission, and purporting to assign

to him 1,300 shares of the stock of the plaintiff company, Pennsylvania Sugar Refining Company.

"(12) Original letter from the defendant Segal to the defendant Kissel, dated May 4th, 1904, and all other letters from said Segal to said Kissel, prior or subsequent thereto.

"(13) Original letter from John E. Parsons to Gustav E. Kissel, dated December 30th, 1903, enclosing with said letter a memorandum entitled 'Mem. re Segal loan.'

90 "(14) All books of account, agreements, notes, obligations, letters, and writings showing the accounts between and the pecuniary transactions between Gustav E. Kissel and the said Adolph Segal or the various corporations controlled by him between October 1st, 1903, and September 1st, 1906, and all returned cheques, drafts, and other vouchers showing the payments made by the said Kissel to the said Segal, directly or indirectly, between and including the said October 1st, 1903, and September 1st, 1906, and by the said Segal to the said Kissel during the same period, and all agreements, notes, and obligations of Adolph Segal or the various corporations controlled by him.

"(15) All books of account, letters, and writings, showing the accounts between and the pecuniary transactions between Gustav E. Kissel and The American Sugar Refining Company between October 1, 1903, and September 1, 1906, and all returned cheques, drafts, and other vouchers showing the payments made by the said The American Sugar Refining Company to the said Kissel and by the said Kissel to the said The American Sugar Refining Company during the said period, directly or indirectly.

"(16) A stock note delivered by the said Adolph Segal to the said Gustav E. Kissel, dated on or about December 30th, 1903, in the amount of $1,250,000, and all title insurance policies covering the title to the property of the Majestic apartment house in the city of Philadelphia and of the sugar refinery of the Pennsylvania Sugar Refining Company in the city of Philadelphia.

"(17) All reports concerning the said Majestic Apartment House Company and concerning the said sugar refinery of the Pennsylvania Sugar Refining Company in the city of Philadelphia received by the defendant Kissel from one R. L. Ashurst, an attorney-at-

91 law, of Philadelphia, Pa., between October 1st and December 30th, 1903.

"(18) All reports of examinations made by experts or others of the said sugar refinery of the Pennsylvania Sugar Refining Company in the city of Philadelphia, and of the said Majestic apartment house property in the said city of Philadelphia, and received by the said defendant Kissel between the 1st day of October and the 30th day of December, 1903.

"(19) The originals of all letters received by the defendant Gustav E. Kissel from John E. Parsons, Henry O. Havemeyer, and the said The American Sugar Refining Company relative to the loan of

$1,250,000 purported to have been made by the said Kissel as agent or individually to the said Segal or the corporations controlled by him on or about December 30th, 1903, and at any other times between October 1st, 1903, and September 1st, 1906, and all letter press or other copies of all letters written by the said Kissel on the same subject to the said John E. Parsons, Henry O. Havemeyer, and The American Sugar Refining Company to cover the period between and including October 1st, 1903, and September 1st, 1906.

"(20) The originals of all letters or memoranda written by the said Kissel to the said Segal between and including October 1st, 1903, and September 1st, 1906.

"(21) The originals of all letters, telegrams, obligations, or memoranda written by one Frank K. Hipple to the said Gustav E. Kissel between October 1st, 1903, and September 1st, 1906, and the letter-press or other copies of the letters, telegrams, obligations, or memoranda written by the said Kissel to the said Hipple between the same dates.

"(22) The original of a certain bond of indemnity executed, or caused to be executed, by the defendant The American Sugar
92 Refining Company, or others in its behalf, to the said Gustav E. Kissel, indemnifying him, the said Kissel, against any damage which he might sustain by entering into the transaction evidenced by the agreement between himself as agent and Adolph Segal, dated on or about December 30th, 1903.

" (23) The original of a certain letter dated Philadelphia, on or about December 30, 1903, from the president of the Pennsylvania Sugar Refining Company to the said Gustav E. Kissel.

" Wherever originals are called for by this subpœna duces tecum, and originals are not in the possession of the person commanded to produce the originals, such person is hereby commanded to produce letter-press or other copies of such originals."

now in your custody, and all other deeds, evidences and writings, which you have in your custody or power concerning the premises. And for a failure to attend, you will be deemed guilty of a contempt of court, and liable to pay all loss and damages sustained thereby to the party aggrieved, and forfeit two hundred and fifty dollars in addition thereto.

Witness, the Hon. Melville W. Fuller, Chief Justice of the United States, at the Borough of Manhattan, in the city of New York, the 10 day of May, 1909.

JOHN A. SHIELDS, *Clerk.*

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed Jul. 29, 1909. John A. Shields, clerk.

93 United States Circuit Court, Southern District of New York.

THE UNITED STATES OF AMERICA, PLAINTIFF,
versus
THOMAS B. HARNED, IMPLEADED WITH THE AMERICAN Sugar Refining Company, Washington B. Thomas, Arthur Donner, Charles H. Senff, John Mayer, George H. Frazier, John E. Parsons, and Gustav E. Kissel, defendants. | Plea in bar.

And now, the said Thomas B. Harned comes into court in his own proper person and by counsel, and having heard read the indictment against him in the above entitled proceeding, found on the first day of July, 1909, says that the United States ought not further prosecute the said indictment against him, and for plea in bar, to each and every of the alleged offences therein charged, he respectfully states as follows, to wit:

First. That all of the alleged offences charged against this defendant in said indictment are barred by the provisions of section 1044 of the Revised Statutes of the United States of America, because said indictment, and each and every count thereof, was not found within the three years next after the offences, or any of them therein alleged, was committed.

Second. That for more than three years next preceding the finding of said indictment on the first day of July, 1909, this defendant has not committed or attempted to commit or participate in any of the offences alleged in said indictment, and has not committed any
94 act against the peace and dignity of the United States alleged in the said indictment, or contrary to the form of the statute of the same in such case made and provided. That more than three years had elapsed between the commission of the offenses alleged in said indictment and each of them and the finding of said indictment. That defendant has not within the period of three years next preceding the finding of said indictment done any act or thing, or committed any overt act, directly or indirectly in pursuance or ratification of or to effect or tending to effect the object of any conspiracy or in furtherance of any offenses set forth in said indictment, or any count thereof.

Third. That for more than three years next preceding the said first day of July, 1909, this defendant was not a member of and did not engage or participate in any conspiracy or conspiracies in restraint of trade or commerce among the several States or with foreign nations, alleged in the several counts of said indictment; that within said period of three years he did not, directly or indirectly, do any act or thing whatsoever in aid or furtherance of or to effect or tending to effect the object of any conspiracy or conspiracies in restraint of such trade or commerce; that the acts and things alleged in said indictment to have been done within said period of three years by others, were not acts or things in aid or furtherance of or to effect or tending to effect the object of any such conspiracy or conspiracies,

and the said alleged overt acts, being alleged therein as overt acts Nos. 13, 14, 15, 16, 17, and 18 were not done with defendant's knowledge or consent, participation, agreement, authority, or ratification.

Fourth. That for more than three years next preceding the finding of said indictment, this defendant has not
95 monopolized or attempted to monopolize, or combined or conspired with any other person or persons to monopolize, and has not done any act or thing whatsoever to monopolize or tending to monopolize the trade or commerce among the several States or with foreign nations, or any part thereof, alleged in said indictment or in any count thereof.

Fifth. That for more than three years next preceding the finding of said indictment, this defendant was not a member of and did not engage or participate in any conspiracy or conspiracies to monopolize any part of the trade or commerce among the several States or with foreign nations, alleged in the several counts of said indictment; that within said period of three years he did not, directly or indirectly, do any act or thing whatsoever in aid or furtherance of or to effect or tending to effect the object of any such conspiracy or conspiracies to monopolize such trade; that the acts and things alleged in said indictment to have been done within said period of three years by others were not acts or things in aid or furtherance of or to effect or tending to effect the object of any such conspiracy or conspiracies to monopolize said trade or commerce, and that the said alleged overt acts or any of them were not done with defendant's participation, knowledge, consent, agreement, authority, or ratification.

Sixth. That at all the times mentioned in said indictment and until the present time, and at all times since the thirtieth day of December, one thousand nine hundred and three, this defendant was subject to the process of this court, and has been and still is an inhabitant and resident of the city of Philadelphia, in the State of Pennsylvania, where he has resided with his family; that at
96 all such times he has been continuously engaged in the practice of law in the city of Philadelphia and has been present there almost daily; that at no time prior to or since said thirtieth day of December, one thousand nine hundred and three, did he leave his home and known place of abode except for temporary absences and never with intent to avoid or flee from detection or punishment for any offense against the United States, and that at no time named in said indictment and at no time since the thirtieth day of December, one thousand nine hundred and three, has this defendant been a fugitive from justice, or in any way or manner whatsoever been fleeing from justice within the intent and meaning of section 1045 of the Revised Statutes of the United States or otherwise.

Seventh. That this defendant is ready to verify and prove the foregoing facts as this court shall direct and award, and prays the judgment of the court if he should be put to further answer this indictment, and pleads the said facts in bar of any prosecution, trial,

or punishment under said indictment, and says that to prosecute or punish him under said indictment or for any alleged offense charged therein or in any of the counts thereof would be to deny him the protection, privilege, and immunity of the statute of the United States in such case made and provided.

Wherefore this defendant, said Thomas B. Harned, prays judgment that this honorable court, by its proper entry of record, may dismiss and discharge him from prosecution, trial, and punishment under said indictment so found on the first day of July, one thousand nine hundred and nine, and now pending in this court against him, and from prosecution and trial for the alleged offences in said in-
97 dictment or in any of the counts thereof charged against him.

New York, August 3rd, 1909.

THOMAS B. HARNED,
By HUNT, HILL & BETTS, *his Attorneys.*
(Office and post-office address, 165 Broadway, New York.)

I hereby certify that the foregoing plea in bar is not interposed for delay and that in my opinion it is well founded in point of law.

New York, August 3rd, 1909.

LEAVITT J. HUNT,
Of Counsel for Defendant.
THOMAS B. HARNED.

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed Aug. 3, 1909. John A. Shields, clerk.

98 *Demurrer to Deft. Kissel's first plea.*

United States Circuit Court for the Southern District of New York.

THE UNITED STATES OF AMERICA, PLAINTIFF,
against
AMERICAN SUGAR REFINING COMPANY, GUSTAV E. KISSEL, and others, defendants.

Now comes the United States of America, by Henry A. Wise, United States attorney for the Southern District of New York, and demurs to the defendant Gustav E. Kissel's first separate plea to each and every count in the indictment herein for the following reason, to wit, that the facts as set forth therein in effect constitute a plea of not guilty.

Wherefore the United States of America demands judgment that the plea is insufficient in law and be overruled, and that the Government have such other and further relief as to the court may seem proper.

HENRY A. WISE,
United States Attorney in and for the Southern District of New York, Attorney for the United States, Plaintiff.

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed Sep. 22, 1909. John A. Shields, clerk.

99 *Demurrer to defendant Harned's plea.*

United States Circuit Court for the Southern District of New York.

THE UNITED STATES OF AMERICA, PLAINTIFF,
against
AMERICAN SUGAR REFINING COMPANY,
Thomas B. Harned and others, defendants.

Now comes the United States of America, by Henry A. Wise, United States attorney for the southern district of New York, and demurs to the plea filed herein August 3, 1909, by the defendant Thomas B. Harned, for the following reason, to wit, that the facts as set forth therein in effect constitute a plea of not guilty.

Wherefore the United States of America demands judgment that the plea is insufficient in law and be overruled, and that the Government have such other and further relief as to the court may seem proper.

HENRY A. WISE,
United States Attorney in and for the Southern District of New York, Attorney for the United States, Plaintiff.

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed Sep. 22, 1909. John A. Shields, clerk.

100 United States Circuit Court for the Southern District of New York.

THE UNITED STATES OF AMERICA, PLAINTIFF,
against
AMERICAN SUGAR REFINING COMPANY,
Gustav E. Kissell and others, defendants.
Joinder in demurrers.

And now comes the said Gustav E. Kissel, and says that his first and second separate pleas herein, and each of them, and the matters therein contained in manner and form as the same are above pleaded and set forth, are sufficient in law to bar and preclude the United States from prosecuting the said indictment against him, the said Gustav E. Kissel; and he is ready to verify and prove the same as this honorable court shall direct and award.

New York, September 30, 1909.

GUSTAV E. KISSEL,
By WILLIAM C. OSBORN, *his Attorney*,
(Office and post-office address, 71 Broadway, New York City.)

A copy of the within paper has been this day received at this office. Sep. 30, 1909.

HENRY A. WISE, *U. S. Attorney.*

(Endorsed:) U. S. Circuit Court, Southern District, N. Y. Filed Sep. 30, 1909. John A. Shields, clerk.

101 United States Circuit Court, Southern District of New York.

UNITED STATES OF AMERICA, PLAINTIFF,
versus
GUSTAV E. KISSEL, IMPLEADED WITH American Sugar Refining Company et al., defendants.

SIR: You will please take notice that the special demurrer heretofore filed by the United States of America to the first separate plea of the Defendant Kissel to each and every count in the indictment in the above entitled proceeding will be brought on for argument at the same time as the argument to the demurrer to the second separate plea herein, and that a motion will then be made for judgment that said plea is sufficient in law and be maintained.

Dated New York, October 4, 1909.

WILLIAM C. OSBORN,
Attorney for Defendant Kissel,
71 Broadway, New York City.

To HENRY A. WISE,
United States Attorney for the Southern District of New York.
(Office and post-office address, room 50, U. S. Court and P. O. building, Borough of Manhattan, city of New York.)

102 United States Circuit Court for the Southern District of New York.

THE UNITED STATES OF AMERICA
versus
GUSTAV E. KISSEL AND THOMAS B. Harned, impleaded with The American Sugar Refining Company and others, defendants.

Henry A. Wise, United States attorney; Charles F. Brown, John W. H. Crim, and James R. Knapp, of counsel; William D. Guthrie and William Church Osborn, for Defendant Kissel; George Whitefield Betts, jr., for Defendant Harned.

HOLT, *J.*:

These are demurrers filed by the Government to pleas in bar interposed by the defendants Kissel and Harned to the indictment. The indictment charges the defendants with a conspiracy in restraint of interstate commerce, in violation of the act of July 2, 1890, commonly called the Sherman Act. The defendants are The American Sugar Refining Company and its directors, and certain other persons. The indictment alleges, in substance, that the defendants conspired to prevent the Pennsylvania Sugar Refining Company
103 from doing business. It is alleged that this result was accom-

plished; that the Defendant Kissel, acting secretly as agent of The American Sugar Refining Company, made a contract to loan to Adolph Segal $1,250,000 upon a note of Segal's, secured by certain collateral, among which collateral were 26,000 shares, being a majority of the stock of the Pennsylvania Sugar Refining Company; that having thus obtained such majority of the stock, a new board of directors, in the interest of The American Sugar Refining Company, was elected; that said board immediately voted to close the refinery of the Pennsylvania Sugar Refining Company; and that it has since done no business. The defendants Kissel and Harned have pleaded, in bar of the prosecution, the statute of limitations, and the Defendant Kissel has also pleaded in bar that, having produced on the trial of a civil action certain documents tending to prove certain facts necessary to be proved in this case, he is entitled to immunity from prosecution under this indictment. Admittedly the general three years' statute of limitations for crimes not capital, contained in section 1044 of the U. S. Revised States, applies in this case. It is also conceded that the execution of the contract between Kissel and Segal, by which the loan was made and the control of a majority of the stock of the Pennsylvania Company obtained, the consent of the Champion Construction Company to the pledge of the stock, the power of attorney by that company to Kissel, the election of the new directors, the meeting of the new board, at which the vote was passed that the Pennsylvania Sugar Refining Company should thereafter refrain from carrying on business until the further order of said board, the ad-
104 vance of $1,250,000 by The American Sugar Refining Company to Kissel, and the loan of that amount by Kissel to Segal were all done, and the entire transaction closed in all respects on or before January 4, 1904. Therefore, the offense alleged in this indictment was complete, and this indictment might have been brought on January 5, 1904. The indictment was not filed until July 1, 1909, more than five years after the time when the alleged conspiracy was entered into and its object entirely accomplished. Obviously, therefore, the statute of limitations is a bar to this prosecution unless the crime charged in the indictment is a continuing offense, or acts have occurred which have renewed the offense and started again the running of the statute.

A conspiracy, in its legal sense, is a misdemeanor at common law. It has been defined as an agreement by two or more persons to do an illegal act, or to do a legal act by illegal methods. Such a conspiracy, if entered into, could be criminally punished at common law, whether any act in furtherance of it was done or not. Sec. 5440 of the U. S. Revised Statutes provides that if two or more persons conspire either to commit any offense against the United States, or to defraud the United States, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to criminal punishment. Under this statute a mere conspiracy is not an offense, but, in addition to the con-

spiracy, one or more of the parties to it must do some act to effect its object before a criminal prosecution can be maintained.

The first section of the Sherman Act provides that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with
105 foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor." The second section of the act provides that "every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor." This indictment is necessarily brought under these provisions of the Sherman Act. No indictment can be brought in the United States courts for the offense of conspiracy at common law, because it has not been made an offense by any United States statute. Nor could this indictment have been brought under sec. 5440 of the U. S. Revised Statutes, because there is no law of the United States making a conspiracy in restraint of trade, or to monopolize trade, an offense against the United States, except the Sherman Act, and there cannot be a conspiracy to engage in a conspiracy. Under the Sherman Act no overt act is necessary to the commission of the offense. That provides that every person who engages in a conspiracy in restraint of trade or commerce, or to monopolize trade, is guilty of the offense. The question in this case, therefore, is when the statute of limitations begins to run in an indictment for conspiracy under the Sherman Act.

The law of conspiracy has been the subject of a great deal of over-refined discussion, and the authorities upon the subject are quite conflicting. Some hold a conspiracy to be an offense complete when entered into and upon which the statute of limitations immediately begins to run. Others hold it to be a continuing offense, from which it is argued that the statute of limitations never begins to run
106 against a conspiracy until it is abandoned and whatever result has been accomplished by it annulled. The Government's counsel, upon the argument, claimed that the defendant, having once entered upon the conspiracy and closed the refinery of the Pennsylvania Company, continued to be engaged in the conspiracy every day so long as the refinery was closed. It would follow from this position that the only way in which the defendants could start the statute of limitations running would be to rescind the vote to close the refinery, have the directors friendly to The American Sugar Company resign, and deliver back to the original holders the stock taken as collateral. No authorities have been cited sustaining such a position. Most of the cases cited have arisen in prosecutions based upon sec. 5440, under which the indictment must not only charge the conspiracy, but one or more overt acts. Some authorities hold that the statute of limitations begins to run in such prosecutions as soon as one overt act has been committed, and that, if more acts in furtherance of the con-

spiracy are performed, that does not stop the running of the statute. (United States v. Owen, 32 Fed., 534; United States v. McCord, 72 Fed., 159; Ex parte Black, 147 Fed., 832; United States v. Biggs, 157 Fed., 264.) Other cases hold, in substance, that each additional overt act starts the statute running anew. (United States v. Bradford, 148 Fed., 413; Ware v. United States, 154 Fed., 577; United States v. Brace, 149 Fed., 874.)

In Ware v. United States (154 Fed., 577) it is held that there cannot be a conviction upon the original conspiracy and overt acts which have taken place more than three years before the finding of the indictment; that there must be proved a conspiracy within the three years, as well as an overt act, and that although the original
107 conspiracy is competent evidence upon the question whether a new or continuing conspiracy has been entered into within the three years, it alone is insufficient to prove such new conspiracy. See also United States v. Black, 160 Fed., 431.

These decisions were all made in other districts. With entire respect for the judges making them, it is impossible to harmonize them. In my opinion, the cases which hold that the statute begins to run after the first overt act, and is not stopped by subsequent overt acts in pursuance of the same conspiracy, take the correct view.

But in any event the decisions under sec. 5440 of the U. S. Revised Statutes are not strictly applicable to this prosecution. The word conspiracy is usually employed with a sinister meaning, but, in my opinion, as used in the Sherman Act, it has substantially the same meaning as the word contract. A conspiracy in restraint of trade is nothing but a contract or agreement between two or more persons in restraint of trade. If this indictment had charged, in the language of the act, that the defendants had made a contract in restraint of trade, I suppose no one would claim that the statute of limitations did not begin to run upon the execution of the contract. How can the Government impose a different liability on the defendants by calling the same thing a conspiracy? I think that the offense was complete in this case when the contract between Kissel and Segal was made. It was unquestionably complete before January 5, 1904, before which date the contract was carried out in all respects, and the object of the alleged conspiracy accomplished. If, however, the doctrine of that class of cases which hold that each new overt act constitutes a new offense, in prosecutions under sec. 5440, were to be followed in this case, the overt acts alleged to have occurred within
108 three years, necessary to constitute a new offense, must be acts which have a tendency to carry out the object of the conspiracy, or in some way tend to make it effectual (United States v. McLaughlin, 169 Fed., 307; United States v. Black, 160 Fed., 431); and each defendant must have participated intentionally in an overt act done within the three years prior to the indictment (Ware v. United States, 154 Fed., 579). So far as the defendant Harned is concerned, he had nothing to do with any overt act alleged in the indictment after December 30, 1903. As to the defendant Kissel, the overt acts alleged in

the indictment as occurring within three years before it was filed, in my opinion, are not acts which had any tendency to carry out the object of the conspiracy, or to make it effectual. The overt acts so alleged are certain resolutions adopted by the directors of The American Sugar Refining Company, agreeing to indemnify the president and counsel for any liability in the Segal matter, certain letters written by one of the defendants to the secretary of The American Sugar Refining Company, and a bill for disbursements rendered by the defendant Kissel to The American Sugar Refining Company, all in the year 1907. In my opinion these alleged overt acts had no tendency to accomplish the object of the conspiracy. The object was completely accomplished before January 5, 1907. One of the letters, dated February 15, 1907, alleged in the indictment as an overt act, shows that the question whether criminal proceedings should be brought had been under consideration by the Department of Justice before that time, but it took no action until this indictment was filed.

The case of United States v. Irvine (98 U. S., 450), although that was not a prosecution for a conspiracy, seems to me to state the
109 principle applicable to such a case better than any other authority that has been cited. In that case an indictment was found for a violation of the act making it a misdemeanor for a pension agent to wrongfully withhold from a pensioner the whole or any part of the pension due to him. The indictment was brought more than three years after the pension money had been received by the pension agent and demanded from him by the pensioner. The trial court held that the offense prohibited by the statute was a continuing offense, and that so long as the defendant continued to withhold the pension money the offense was not barred by the statute of limitations. The Supreme Court overruled that decision. Mr. Justice Miller, in the opinion, says:

"There is in this but one offense. When it is committed, the party is guilty and is subject to criminal prosecution, and from that time, also, the statute of limitations applicable to the offense begins to run. It is unreasonable to hold that twenty years after this he can be indicted for wrongfully withholding the money, and be put to prove his innocence after his receipt is lost, and when perhaps the pensioner is dead. * * * He pleads the statute, * * * which was made for such a case as this: but the reply is, You received the money. You have continued to withhold it these twenty years; every year, every month, every day was a withholding within the meaning of the statute.

"We do not so construe the act. Whenever the act or series of acts necessary to constitute a criminal withholding of the money have transpired the crime is complete, and from that day the statute of limitations begins to run against the prosecution."

There seems to be an increasing tendency in recent years for public prosecutors to indict for conspiracies when crimes have been
110 committed. A conspiracy to commit a crime may be a sufficiently serious offense to be properly punished; but when a crime has been actually committed by two or more persons, there is

usually no proper reason why they should be indicted for the agreement to commit the crime instead of for the crime itself. A large class of federal prosecutions for commercial offenses, such, for instance, as violations of the interstate-commerce act, the Sherman Act, the bankrupt act, the acts relating to public lands, and many others, now habitually take the form of indictments for conspiracies to commit crimes, the actual commission of which is also usually alleged in the indictment. Prosecutors seem to think that by this practice all statutes of limitations and many of the rules of evidence established for the protection of persons charged with crime can be disregarded. But there is no mysterious potency in the word conspiracy. If a conspiracy to commit a crime has been carried out, and the crime committed, the crime, in my opinion, cannot be made something else by being called a conspiracy. The men who have committed the crime are liable to whatever penalties the law imposes, and to whatever protection the law affords. If the statute of limitations is a bar to a prosecution for the crime, that bar, in my opinion, cannot be lifted by a prosecution for a conspiracy to commit that crime. Statutes of limitations are beneficial statutes. The interests of the community and justice to persons charged with crime require that offenses be promptly prosecuted. Statutes of limitations should be given a plain and sensible construction. Their effect should not be frittered away by a strained interpretation, based on subtle and refined reasoning. The Government has waited, before bringing this prosecution, for five years and a half after the alleged offense was com-
111 plete, and, in my opinion, the statute of limitations is a bar to this indictment.

This conclusion makes it unnecessary to consider the doubtful question raised by the plea of immunity interposed by the defendant Kissel.

The ground of demurrer that the plea in bar of the statute of limitations will not lie because the plea is, in substance, a plea of not guilty, seems to me, if I correctly understand it, wholly untenable. The defense of the statute of limitations could be raised on the trial under the general plea of not guilty, but it can also be raised by a special plea before the trial.

The demurrers to the pleas in bar interposed by the defendants Kissel and Harned are overruled, and judgment dismissing the indictment as to said defendants may be entered.

October 26, 1909.

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed Oct. 26, 1909. John A. Shields, clerk.

112 *Order for judgment.*

At a stated term of the United States Circuit Court for the Southern District of New York, duly held in the Post-Office building, Bor-

ough of Manhattan, city of New York, on the ninth day of November, 1909.

Present: Hon. George C. Holt, judge.

THE UNITED STATES OF AMERICA
versus
GUSTAVE E. KISSEL AND THOMAS B. HARNED, impleaded with The American Sugar Refining Company, Washington B. Thomas, Arthur Donner, Charles H. Senff, John Mayer, George H. Frazier, and John E. Parsons, defendants.

An indictment against the defendants above named having been found and filed by the grand jurors in and for the Southern District of New York on the first day of July, 1909, and the defendants having been thereupon severally arraigned, and the defendants Kissel and Harned having thereafter interposed special pleas in bar on the ground that the said indictment had not been found within three years next after the offenses charged in the indictment or any of them had been committed, and the United States having interposed and filed its demurrer to each of said special pleas, and the said defendants having served joinders in demurrer and noticed the issues on said demurrers and joinders for argument, and said issues having duly come on to be heard; and after hearing Henry A. Wise, United States attorney for the Southern District of New York, and Charles F. Brown, special counsel for the United States, in support
113 of said demurrers, and William D. Guthrie, of counsel for the defendant Kissel, and George Whitefield Betts, junior, of counsel for the defendant Harned, in opposition thereto and in support of said several pleas, and the court having taken the same under advisement and duly considered said issues and being fully advised in the premises;

Now, on motion of William Church Osborn, as attorney for the defendant Kissel, and Hunt, Hill & Betts, as attorneys for the defendant Harned, it is

Ordered that said demurrers so interposed by the United States to said special pleas be, and the same hereby are, severally overruled, and that said pleas be severally sustained as sufficient in law; and it is

Further ordered that judgment be entered overruling the several demurrers of the United States to said pleas and each of them and sustaining said pleas and each of them as sufficient in law and dismissing as to said defendants Kissel and Harned the indictment so found and filed on July first, 1909.

GEO. C. HOLT, J.

Approved as to form, Nov. 9, 1909.

HENRY A. WISE,
United States Attorney.
HUNT, HILL & BETTS,
Attys. for Deft. Harned.
WM. CHURCH OSBORN,
Atty. for Deft. Kissel.

114 *Judgment.*

United States Circuit Court, Southern District of New York.

THE UNITED STATES OF AMERICA *versus* GUSTAV E. KISSEL AND THOMAS B. Harned, impleaded with The American Sugar Refining Company, Washington B. Thomas, Arthur Donner, Charles H. Senff, John Mayer, George H. Frazier, and John E. Parsons, defendants.	Judgment overruling demurrers to special pleas and dismissing indictment as to defendants Kissel and Harned. Dated November 9th, 1909.

An indictment against the defendants above named having been found and filed by the grand jurors in and for the Southern District of New York on the first day of July, 1909, and the defendants having been thereupon severally arraigned, and the defendants Kissel and Harned having thereafter interposed special pleas in bar on the ground that the said indictment had not been found within three years next after the offenses charged in the indictment or any of them had been committed, and the United States having interposed and filed its demurrer to each of said special pleas, and the said defendants having served joinders in demurrer and noticed the issues on said demurrers and joinders for argument, and said issues having duly come on to be heard and been heard; and the court having taken the same under advisement and been fully advised in the premises, and having overruled said demurrers and sustained said pleas as sufficient in law, and directed judgment to be accordingly entered dismissing the indictment as to said defendants;

Now, on motion of William Church Osborn, as attorney for the defendant Kissel, and Hunt, Hill & Betts, as attorneys for the defendant Harned, it is

115 Ordered and adjudged that the demurrers interposed by the United States to said special pleas be, and the same hereby are, severally overruled; that said pleas be, and the same hereby are, severally sustained as sufficient in law, and that the indictment so found and filed July first, 1909, against the defendants above named be, and the same hereby is, dismissed as to the defendants Gustav E. Kissel and Thomas B. Harned.

JOHN A. SHIELDS, *Clerk.*

Approved as to form, Nov. 9, 1909.

HENRY A. WISE,
United States Attorney.
WM. CHURCH OSBORN,
Atty. for Deft. Kissel.
HUNT, HILL & BETTS,
Attys. for Deft. Harned.

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed Nov. 9, 1909. John A. Shields, clerk.

116 United States Circuit Court, Southern District of New York.

UNITED STATES OF AMERICA
v.
GUSTAV E. KISSEL AND THOMAS B. HARNED, impleaded with American Sugar Refining Co. and others, defendants.

GENTLEMEN: You will please take notice that a motion will be made before the Hon. George C. Holt, at the term of the United States Circuit Court for the Southern District of New York, to be held in and for the said district in the Post-Office building in the Borough of Manhattan, in the city of New York, on the 19th day of November, 1909, at 11.30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for a resettlement of the order and judgment entered in the above entitled proceeding on November 9, 1909, so as to read in the manner and form hereto annexed.

Dated New York, Nov. 16th, 1909.

HENRY A. WISE,
U. S. Attorney, Attorney for the United States.
(Office & P. O. address, Room 50, P. O. bldg., Borough of Manhattan, city of New York.)

To WILLIAM CHURCH OSBORN, Esq.,
Atty. for the Deft. Kissel, 71 Broadway, City.
Messrs. HUNT, HILL & BETTS,
Attys. for Deft. Harned, 165 Broadway, City.

117 *Order resettling order of judgment.*

At a stated term of the United States Circuit Court for the Southern District of New York held in the Post-Office building in the Borough of Manhattan, city of New York, in said district, on the 24th day of November, 1909.

Present: Hon. George C. Holt, judge.

UNITED STATES OF AMERICA
v.
GUSTAV E. KISSEL AND THOMAS B. HARNED, impleaded with American Sugar Refining Co. and others, defendants.

Upon reading the order of this court in the above entitled action made and entered November 9, 1909, and the judgment entered thereon on said last mentioned date in the office of the clerk of this court, and upon reading and filing the notice of motion for this order dated November 16, 1909, and proof of the service thereof upon the attorneys for the defendants Kissel and Harned, and upon motion

of Henry A. Wise, United States attorney for the United States herein, it is

Ordered that the said order made and entered November 9, 1909, and the judgment entered thereon November 9, 1909, be and the same hereby are resettled and amended so that the said order and judgment shall read as follows:

118 At a stated term of the United States Circuit Court for the Southern District of New York, duly held in the post-office building, Borough of Manhattan, city of New York, on the 19th day of November, 1909.

Present: Hon. George C. Holt, judge.

THE UNITED STATES OF AMERICA
versus
GUSTAV E. KISSEL AND THOMAS B. HARNED, Impleaded with The American Sugar Refining Company, Washington B. Thomas, Arthur Donner, Charles H. Senff, John Mayer, George H. Frazier, and John E. Parsons, defendants.

An indictment against the defendants above named having been found and filed by the grand jurors in and for the Southern District of New York on the first day of July, 1909, and the defendants having been thereupon severally arraigned and the defendants, Kissel and Harned, having thereafter interposed special pleas in bar on the ground that the said indictment had not been found within three years next after the offense charged in the indictment or any of them had been committed, and the United States having interposed and filed its demurrer to each of said special pleas, and the said defendants having served joinders in demurrer and noticed the issues on said demurrers and joinders for argument, and the United States having also moved that the said special plea of defendant

119 Harned be treated as a plea of not guilty, and said issues having duly come on to be heard; and after hearing Henry A. Wise, United States attorney for the Southern District of New York, and Charles F. Brown, special counsel for the United States, in support of said demurrers, and William D. Guthrie, of counsel for the defendant Kissel, and George Whitefield Betts, junior, of counsel for the defendant Harned, in opposition thereto and in support of said several pleas, and the court having taken the same under advisement and duly considered said issues and being fully advised in the premises;

Now, on motion of William Church Osborn, as attorney for the defendant Kissel, and Hunt, Hill & Betts, as attorneys for the defendant Harned, it is

Ordered that said demurrers so interposed by the United States to said special pleas be, and the same hereby are, severally overruled and that said pleas be severally sustained as sufficient in law; and it is

Further ordered that said motion be denied; and it is

Further ordered that judgment be entered overruling the several demurrers of the United States to said pleas and each of them and sustaining said pleas and each of them as sufficient in law and dismissing as to said defendants Kissel and Harned the indictment so found and filed on July first, 1909.

GEORGE C. HOLT, *Judge.*

120 *Judgment.*

United States Circuit Court, Southern District of New York.

THE UNITED STATES OF AMERICA,
versus
GUSTAV E. KISSEL AND THOMAS B. Harned, impleaded with The American Sugar Refining Company, Washington B. Thomas, Arthur Donner, Charles H. Senff, John Mayer, George H. Frazier, and John E. Parsons, defendants.

Judgment overruling demurrers to special pleas and dismissing indictment as to defendants Kissel and Harned. Dated November 9, 1909.

An indictment against the defendants above named having been found and filed by the grand jurors in and for the Southern District of New York on the first day of July, 1909, and the defendants having been thereupon severally arraigned and the defendants Kissel and Harned having thereafter interposed special pleas in bar on the ground that the said indictment had not been found within three years next after the offenses charged in the indictment or any of them had been committed, and the United States having interposed and filed its demurrer to each of said special pleas and the said defendants having served joinders in demurrer and noticed the issues on said demurrers and joinders for argument, and the United States having also moved that the said special plea of defendant Harned be treated as a plea of not guilty, and said issues having duly come on to be heard and been heard; and the court having taken the same under advisement and been fully advised in the premises and having overruled said demurrers and sustained said plea as sufficient
121 in law, and directed judgment to be accordingly entered dismissing the indictment as to said defendants;

Now, on motion of William Church Osborn, as attorney for the defendant Kissel, and Hunt, Hill & Betts, as attorneys for the defendant Harned, it is

Ordered and adjudged that the demurrers interposed by the United States to said special pleas be, and the same hereby are, severally overruled; that said pleas be, and the same hereby are, severally sustained as sufficient in law, and that the said motion be denied, and that the indictment so found and filed July first, 1909, against the

defendants above named be and the same hereby is dismissed as to the defendants Gustav E. Kissel and Thomas B. Harned.

[L. S.] JOHN A. SHIELDS, *Clerk.*

(Endorsed:) U. S. Circuit Court, Southern District of N. Y. Filed Nov. 27, 1909. John A. Shields, clerk.

122 *Notice of motion and affidavit.*

United States Circuit Court, Southern District of New York.

THE UNITED STATES OF AMERICA
against
GUSTAV E. KISSEL AND THOMAS B. HARNED, impleaded with The American Sugar Refining Company and others, defendants.

You will please take notice that on the annexed affidavit of William Church Osborn, the defendants Kissel and Harned will apply to this court in the United States Post-Office building, on Wednesday, the 15th day of December, 1909, at 10.30 a. m., or as soon thereafter as counsel can be heard, for an order nunc pro tunc, directing the clerk of this court to insert in the record of this case as the same is to be transmitted to the Supreme Court of the United States under and in pursuance of the writ of error heretofore allowed the plaintiff by this court, a certificate substantially in the words following:

"This is to certify that the order and judgment of November 9th, 1909, in the above entitled cause, overruling the demurrers to the special pleas in bar of the defendants Kissel and Harned were settled upon due notice to the United States and approved as to form by its attorney, and were subsequently and on November 19th, 1909, re-settled upon application of the United States, and that at no time prior to the entry of said order and judgment or to the resettlement thereof, was any suggestion made by the United States to the
123 court that it did not intend and elect to stand on its demurrer, but desired to be permitted to plead over and traverse the special pleas in bar, nor was an application or motion at any time made to the court for leave to plead over and traverse the allegations of the defendants' special pleas in bar."

New York, December 14, 1909.

(Signed) WM. CHURCH OSBORN,
Attorney for Defendant Kissel.

(Signed) HUNT, HILL & BETTS,
Attorneys for Defendant Harned.

To HENRY A. WISE, Esq.,
United States Attorney,
Post-Office Building, N. Y. City.

124 United States Circuit Court, Southern District of New York.

THE UNITED STATES OF AMERICA
against
GUSTAV E. KISSEL AND THOMAS B. HARNED, impleaded with The American Sugar Refining Company and others, defendants.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

WILLIAM CHURCH OSBORN, being duly sworn, deposes and says:

1. I am the attorney in the above action for the defendant Gustav E. Kissel.

2. The defendant Kissel, on July 29th, 1909, duly filed two special pleas in bar interposing the defense of the statute of limitations and the defense of immunity, and the defendant Harned, on August 3rd, 1909, duly filed a similar special plea interposing the defense of the limitation. Thereafter, and on the 22nd day of September, 1909, the United States filed demurrers to each of said pleas, whereupon said defendants duly filed joinders in demurrer and duly noticed the issues of law upon such demurrers for argument before this court. The said issues of law came on for argument in this court on October 8th, 1909, and counsel were heard on behalf of the United States in support of said demurrers, and on behalf of the defendants Kissel and Harned in opposition thereto. The court subsequently filed an opinion, in which it held and directed that said demurrers be overruled and that judgment dismissing the indictment as to said defendants be entered, and declared that this conclusion made it un-

125 necessary to consider the question raised by the plea of immunity interposed by the defendant Kissel and the demurrer thereto. Thereafter, and on November 4th, 1909, the defendants Kissel and Harned served upon the United States a proposed order and judgment, which were noticed for presentation to the court and settlement on November 8th, 1909, but which presentation and settlement were adjourned at the request of the United States until November 9th, 1909, when the order and judgment were entered, and the United States attorney in writing approved the form of the order and judgment. Thereafter, and on November 16th, 1909, the United States served a notice of motion to have the judgment and order amended in respect to a motion which the United States had made to treat the special plea of the defendant Harned as a plea of not guilty, and on November 19th, 1909, such application was argued before the court, and thereupon, on motion of the United States, an amended order and amended judgment were entered on said November 19th, 1909.

3. Thereafter, and on the 8th day of December, 1909, the United States presented to the court a petition for a writ of error, alleging among other things that error had happened as assigned in the assignment of errors therewith submitted to the court, and thereupon this

court granted the petition for writ of error. In such assignment of errors so presented with said petition for writ of error it is assigned, in eight separate assignments stated in various forms, that the court erred in sustaining the plea of the defendants Kissel and Harned setting up the defense of the statute of limitations and in dismissing the indictment as to them without permitting the United
126 States to plead over and traverse said pleas, and without requiring the defendant to prove the facts alleged in said pleas.

4. Deponent further states that at no time prior to the assignment of errors on December 8th, 1909, was any suggestion made by or on behalf of the United States that it did not elect to stand on its demurrer, or that it desired to be permitted to plead over and traverse the allegations of said special pleas in bar, and that so far as the said defendants or their attorneys are informed, no suggestion, application, or motion has at any time been made to the court or to the said defendant or their attorneys for leave or permission so to plead over and traverse.

(Signed) WILLIAM CHURCH OSBORN.

Subscribed and sworn to before me this 14th day of December, 1909.

(Signed) RICHARD V. GREENE,
Notary Public, N. Y. Co.

(Endorsed:) A copy of the within paper has been this day received at this office. Dec. 14, 1909. Henry A. Wise, U. S. attorney. U. S. Circuit Court, Southern District N. Y. Filed Dec. 17, 1909. John A. Shields, clerk.

127 *Order for certificate nunc pro tunc as of November 29, 1909.*

United States Circuit Court, Southern District of New York.

THE UNITED STATES OF AMERICA
against
GUSTAV E. KISSEL AND THOMAS B. HARNED, impleaded with The American Sugar Refining Company and others, defendants.

On the annexed notice of motion and affidavit of William Church Osborn, verified December 13, 1909, it is

Ordered that the clerk be, and he hereby is, directed to file as part of the record of the above entitled suit, nunc pro tunc as of the 24th day of November, 1909, being the date when the order and judgment herein were re-settled on motion of the United States, this order certifying as follows, namely, that the order and judgment dated November 9th, 1909, in the above entitled cause, overruling the demurrer to the special pleas in bar of the defendants Kissel and Harned were settled upon due notice to the United States and approved as to form by its attorney; that they were subsequently and on November 24th,

1909, re-settled upon application of the United States; that at no time prior to the entry of said order and judgment or to the re-settlement thereof, as aforesaid, was any suggestion made by the United States to the court or to the defendants' attorneys that the United States did not intend and elect to stand on its demurrer, but desired to be permitted to plead over and traverse the special pleas in bar, and that no application or motion was at any time made to the court by the United States for leave to plead over and traverse the allegations of the defendants' special pleas in bar.

New York, December 17, 1909.

GEO. C. HOLT, *J.*

128 (Endorsed:) U. S. Circuit Court, Southern District of N. Y. Filed Dec. 17, 1909. John A. Shields, clerk.

129 United States Circuit Court, Southern District of New York, Second Circuit.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
vs.
GUSTAV E. KISSEL AND THOMAS B. HARNED, IMPLEADED with others, defendants.

Assignment of errors.

The United States of America, in connection with its petition for a writ of error, makes the following assignment of errors, which, it avers, occurred in the decision and order for judgment, and in the judgment of the court herein, sustaining the special pleas in bar of the defendants, Gustav E. Kissel and Thomas B. Harned, and quashing, setting aside, and dismissing, and sustaining demurrers to, the indictment herein, as to those defendants, to wit:

(NOTE.—Assignment No. 2 is the same as assignment No. 1, except that it refers to Defendant Harned, while No. 1 refers to Defendant Kissel. This is true as to each couple of assignments following Nos. 1 and 2, except that assignments 19 and 20 differ in another respect, and assignment No. 10½, referring to Defendant Harned, is single.)

130 1.

In view of the charges contained in the indictment in this case, the court erred in sustaining, by its decision and judgment, the first separate special plea in bar of the defendant, Gustav E. Kissel, filed July 29, 1909, setting up the statute of limitations.

2.

In view of the charges contained in the indictment in this case, the court erred in sustaining, by its decision and judgment, the special

plea in bar of the defendant, Thomas B. Harned, filed August 3, 1909, setting up the statute of limitations.

3.

The court erred in construing the indictment in this case as being an indictment charging only the making of a contract in restraint of trade and commerce among the several States and with foreign nations, within the meaning of the act of Congress approved July 2, 1890, and thereupon sustaining the first separate special plea in bar of the defendant Kissel, on the ground that the indictment was not found within three years after the making of such contract.

4.

The court erred in construing the indictment in this case as being an indictment charging only the making of a contract in restraint of trade and commerce among the several States and with foreign nations, within the meaning of the act of Congress approved July 2, 1890, and thereupon sustaining the special plea in bar of the defendant Harned, on the ground that the indictment was not found within three years after the making of such contract.

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5.

The court erred in holding that by reason of the setting out in that part of the indictment where overt acts are specified of a certain contract, dated December 30, 1903, between one Adolph Segal and the defendant Gustav E. Kissel, the indictment in legal effect charged only the making, by all the defendants, of a contract in restraint of trade and commerce among the several States and with foreign nations within the meaning of said act of Congress, and in thereupon sustaining the first separate plea of the defendant Kissel setting up the three year statute of limitations in bar of his prosecution under the indictment.

6.

The court erred in holding that by reason of the setting out in that part of the indictment where overt acts are specified of a certain contract, dated December 30, 1903, between one Adolph Segal and the defendant Gustav E. Kissel, the indictment in legal effect charged only the making, by all the defendants, of a contract in restraint of trade and commerce among the several States and with foreign nations within the meaning of said act of Congress, and in thereupon sustaining the special plea of the defendant Harned setting up the three year statute of limitations in bar of his prosecution under the indictment.

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7.

The court erred in not construing the indictment in this case as being one sufficiently charging the defendant with engaging in conspiracies in restraint of trade and commerce among the several States and with foreign nations, the monopolizing, attempting to monopolize and the conspiring together to monopolize, such trade and commerce, during the three years next preceding the finding and presentation of the indictment in this case, within the meaning of said act of Congress, and in not overruling the first separate special plea of the defendant Kissel setting up the three year statute of limitations in bar of his prosecution under the indictment.

8.

The court erred in not construing the indictment in this case as being one sufficiently charging the engaging in conspiracies in restraint of trade and commerce among the several States and with foreign nations, the monopolizing, attempting to monopolize and conspiring of the defendants together to monopolize, such trade and commerce, during the three years next preceding the finding and presentation of the indictment in this case, within the meaning of the said act of Congress, in not overruling the special plea of the defendant Harned setting up the three year statute of limitations in bar of his prosecution under the indictment.

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9.

The court erred in overruling the special demurrer filed by the United States to the first separate special plea in bar of the defendant Kissel setting up the statute of limitations, and in sustaining said special plea as being sufficient in law, instead of sustaining said special demurrer and overruling said special plea for the reason that said special plea amounted to a plea of not guilty and was therefore bad as a special plea in bar.

10.

The court erred in overruling the special demurrer filed by the United States to the special plea in bar of the defendant Harned setting up the statute of limitations, and in sustaining said special plea as being sufficient in law, instead of sustaining said special demurrer and overruling said special plea for the reason that said special plea amounted to a plea of not guilty and was therefore bad as a special plea in bar.

10½.

The court erred in sustaining, as being a sufficient plea of the statute of limitations to the indictment in this case, the special plea in bar of the defendant Harned, and in denying the motion made by

the United States for an order directing that said plea be treated as a plea of not guilty, instead of granting said motion on the ground that said plea amounted to a plea of not guilty.

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11.

The court erred in overruling the special demurrer filed by the United States to the first separate special plea in bar of the defendant Kissel setting up the statute of limitations, and in sustaining said special plea as being sufficient in law, instead of overruling said special plea for the reason that it was double, in that it attempted to combine a plea of the statute of limitations with a plea of not guilty.

12.

The court erred in overruling the special demurrer filed by the United States to the special plea in bar of the defendant Harned setting up the statute of limitations, and in sustaining said special plea as being sufficient in law, instead of overruling said special plea for the reason that it was double, in that it attempted to combine a plea of the statute of limitations with a plea of not guilty.

13.

The court erred in sustaining the first separate special plea in bar of Defendant Kissel and immediately thereupon dismissing the indictment in this case as to that defendant without permitting the United States to traverse said plea upon the overruling of the special demurrer of the United States to said plea.

14.

The court erred in sustaining the special plea in bar of Defendant Harned and immediately thereupon dismissing the indictment in this case as to that defendant without permitting the United States to traverse said plea upon the overruling of the special demurrer of the United States to said plea.

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15.

Having overruled the special demurrer of the United States to the first separate plea in bar of Defendant Kissel, the court erred in immediately, and without permitting the United States to traverse the same, and without requiring said defendant to prove the facts therein stated to be true, sustaining said special plea.

16.

Having overruled the special demurrer of the United States to the special plea in bar of Defendant Harned, the court erred in immedi-

ately, and without permitting the United States to traverse the same, and without requiring said defendant to prove the facts therein stated to be true, sustaining said special plea.

17.

Having overruled the special demurrer of the United States to the first separate special plea in bar of Defendant Kissel on the ground that said plea was not bad as being a plea amounting to a plea of not guilty, the court erred in thereupon treating that plea as though the facts set up in it had been proven by said defendant and immediately sustaining said plea instead of merely sustaining said plea as being a good and sufficient plea in law of the statute of limitations and permitting the United States to traverse the same or otherwise plead further.

136 18.

Having overruled the special demurrer of the United States to the special plea in bar of Defendant Harned on the ground that said plea was not bad as being a plea amounting to a plea of not guilty, the court erred in thereupon treating that plea as though the facts set up in it had been proven by said defendant and immediately sustaining said plea instead of merely sustaining said plea as being a good and sufficient plea in law of the statute of limitations and permitting the United States to traverse the same or otherwise plead further.

19.

The court erred in sustaining the first separate special plea of Defendant Kissel, setting up the statute of limitations in bar, on the ground that the overt acts set forth in the indictment as having been committed by him within the three years next preceding the finding of the indictment by the grand jury were not acts having a "tendency to carry out the object of the conspiracy or to make it effectual."

20.

The court erred in sustaining the special plea of Defendant Harned, setting up the statute of limitations in bar, on the ground that no overt act was set forth in the indictment as having been committed by him within the three years next preceding the finding of the indictment by the grand jury.

21.

The court erred in sustaining the first separate special plea of Defendant Kissel, setting up the statute of limitations in bar, on the ground that the offenses charged in the indictment were completed more than three years before the finding of the indictment by the grand jury.

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22.

The court erred in sustaining the special plea of Defendant Harned, setting up the statute of limitations in bar, on the ground that the offenses charged in the indictment were completed more than three years before the finding of the indictment by the grand jury.

23.

The court erred in not overruling the first separate special plea of Defendant Kissel, setting up the statute of limitations in bar, on the ground that the indictment in this case sufficiently charged the defendants with the offenses of engaging in conspiracies in restraint of trade and commerce among the several States and with foreign nations, of monopolizing and attempting to monopolize, and conspiring together to monopolize, such trade and commerce, within the three years next preceding the finding of the indictment; and on the ground that the United States would not be confined at the trial to proving only the overt acts set forth in the indictment, or to proving the continuation of those offenses by proving the committing of overt acts by the defendants or by any of them, or prevented from proving that the overt acts set forth in the indictment in fact had a "tendency to carry out the object of the conspiracy or make it effectual" even though they may not on their face show such tendency; and on the ground, also, that in a case like this where an overt act is charged in the indictment to have been committed by any defendant at any time after the inception of a continuing offense the United States would not be required, at the trial, to prove the committing by each or any defendant, within the three years next preceding
138 the finding of the indictment, of any overt act, but might prove the charges in the indictment by any evidence showing the continuation of the offense or the conscious participation of each defendant, within the three years next preceding the finding of the indictment, in a continued offense, instead of sustaining said plea as it did.

24.

The court erred in not overruling the special plea of Defendant Harned, setting up the statute of limitations in bar, on the ground that the indictment in this case sufficiently charged the defendants with the offenses of engaging in conspiracies in restraint of trade and commerce among the several States and with foreign nations, of monopolizing and attempting to monopolize, and conspiring together to monopolize, such trade and commerce, within the three years next preceding the finding of the indictment; and on the ground that the United States would not be confined at the trial to proving only the overt acts set forth in the indictment or to proving the continuation of those offenses by proving the committing of overt acts by the defendants or by any of them, or prevented from proving that the

overt acts set forth in the indictment in fact had a "tendency to carry out the object of the conspiracy or make it effectual," even though they may not on their face show such tendency; and on the ground, also, that in a case like this where an overt act is charged in the indictment to have been committed by any defendant at any time after the inception of a continuing offense, the United States would not be required, at the trial, to prove the committing by each or any defendant, within the three years next preceding the finding of
139 the indictment, of any overt act, but might prove the charges in the indictment by any evidence showing the continuation of the offense or the conscious participation of each defendant, within the three years next preceding the finding of the indictment, in a continued offense, instead of sustaining said plea as it did.

25.

The offenses charged in the several counts of the indictment in this case being in their nature continuing offenses, and all the defendants, including the defendant Kissel, being charged in terms therein with committing said offenses continuously throughout the period of six years next preceding the finding and presentation of the indictment by the grand jury, the court erred in sustaining as being sufficient in law the first separate special plea filed by said Defendant Kissel on July 29, 1909, seeking to bar his prosecution under said indictment by reason of the fact alleged in said plea that said indictment was not found within three years next after the offense therein charged was committed, and by reason of the provisions of section 1044 of the Revised Statutes of the United States.

26.

The offenses charged in the several counts of the indictment in this case being in their nature continuing offenses, and all the defendants, including the defendant Harned, being charged in terms therein with committing said offenses continuously throughout the period of six years next preceding the finding and presentation of the
140 indictment by the grand jury, the court erred in sustaining as being sufficient in law the special plea filed by said Defendant Harned on August 3, 1909, seeking to bar his prosecution under said indictment by reason of the fact alleged in said plea that said indictment was not found within three years next after the offense therein charged was committed, and by reason of the provisions of section 1044 of the Revised Statutes of the United States.

27.

The court erred in sustaining the first separate special plea in bar of the defendant Kissel on the ground that the overt acts set forth in the indictment showed that the indictment did not charge the

commission by the defendant of any offense within the three years next preceding the finding of the indictment by the grand jury, instead of overruling said plea on the ground that the overt acts set forth in the indictment could not be referred to by the court for the purpose of determining whether any offense was sufficiently charged in such indictment, or for the purpose of contradicting the allegations in those parts of the indictment in which the offenses therein charged are described.

141 28.

The court erred in sustaining the special plea in bar of the defendant Harned on the ground that the overt acts set forth in the indictment showed that the indictment did not charge the commission by the defendants of any offense within the three years next preceding the finding of the indictment by the grand jury, instead of overruling said plea on the ground that the overt acts set forth in the indictment could not be referred to by the court for the purpose of determining whether any offense was sufficiently charged in such indictment, or for the purpose of contradicting the allegations in those parts of the indictment in which the offenses therein charged are described.

29.

The court erred in holding that in legal effect the facts stated in the indictment showed only violations of that provision in the act of Congress approved July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies" (26 Stat., 209), which denounces the making of contracts in restraint of trade and commerce among the several States and with foreign nations, and in thereupon accordingly sustaining the first separate special plea in bar of Defendant Kissel as sufficiently showing that the indictment was not found within three years next after such offenses were severally committed.

142 30.

The court erred in holding that in legal effect the facts stated in the indictment showed only violations of that provision in the act of Congress approved July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies" (26 Stat., 209), which denounces the making of contracts in restraint of trade and commerce among the several States and with foreign nations, and in thereupon accordingly sustaining the special plea in bar of Defendant Harned as sufficiently showing that the indictment was not found within three years next after such offenses were severally committed.

31.

The court erred in treating as a general demurrer the first separate special plea of Defendant Kissel seeking to bar prosecution of the in-

dictment in this case as to him by reason of the fact alleged in said plea that said indictment was not found within three years next after the offense therein charged was committed, and by reason of the provisions of section 1044 of the Revised Statutes of the United States, and sustaining such demurrer to said indictment upon a construction of the statute upon which the same was founded such that the court held as a matter of law that said statute, it being the act of Congress approved July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," was applicable to the facts stated in the indictment only as said act denounces the making of contracts in restraint of trade and commerce among the several States and with foreign nations, such offenses not being continuing offenses in their nature, and not as it denounces the continuing offenses of engaging in conspiracies in restraint of such trade
143 and commerce, and of monopolizing and attempting to monopolize such trade and commerce, and of the conspiring of persons and corporations together to monopolize the same, in terms charged in the indictment.

32.

The court erred in treating as a general demurrer the special plea of Defendant Harned, seeking to bar prosecution of the indictment in this case as to him by reason of the fact alleged in said plea that said indictment was not found within three years next after the offense therein charged was committed, and by reason of the provisions of section 1044 of the Revised Statutes of the United States, and sustaining such demurrer to said indictment upon a construction of the statute upon which the same was founded such that the court held as a matter of law that said st*a*'ute, it being the act of Congress approved July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," was applicable to the facts stated in the indictment only as said act denounces the making of contracts in restraint of trade and commerce among the several States and with foreign nations, such offenses not being continuing offenses in their nature, and not as it denounces the continuing offenses of engaging in conspiracies in restraint of such trade and commerce, and of monopolizing and attempting to monopolize such trade and commerce, and of the conspiring of persons and corporations together to monopolize the same, in terms charged in the indictment.

144 33.

The court erred in treating as a general demurrer the first separate special plea in bar of Defendant Kissel and sustaining such demurrer and dismissing the indictment upon a construction of the statute upon which the indictment was founded, to the effect that the word conspiracy as used in that statute has substantially the same meaning as the word contract.

34.

The court errred in treating as a general demurrer the special plea in bar of Defendant Harned and sustaining such demurrer and dismissing the indictment upon a construction of the statute upon which the indictment was founded, to the effect that the word conspiracy, as used in that statute, has substantially the same meaning as the word contract.

35.

Having so treated as a general demurrer the first separate special plea in bar of the defendant, Kissel, the court erred in not overruling such demurrer upon a construction of said statute upon which the indictment was founded, involving and holding as a matter of law that said statute was applicable to the facts stated in the indictment, as said statute denounces the continuing offenses charged in the indictment of engaging in conspiracies in restraint of trade and commerce among the several States and with foreign nations, of monopolizing and attempting to monopolize such trade and commerce, and of the conspiring of persons and corporations together to monop-
145 olize the same, instead of upon a construction of said statute involving the holding as matter of law that said statute was applicable to the facts so stated in the indictment only as it denounces the making of contracts in restraint of trade and commerce among the several States and with foreign nations.

36.

Having so treated as a general demurrer the special plea in bar of the defendant, Harned, the court erred in not overruling such demurrer upon a construction of said statute upon which the indictment was founded involving the holding as a matter of law that said statute was applicable to the facts stated in the indictment as said statute denounces the continuing offenses charged in the indictment of engaging in conspiracies in restraint of trade and commerce among the several States and with foreign nations, of monopolizing and attempting to monopolize such trade and commerce and of the conspiring of persons and corporations together to monopolize the same, instead of upon a construction of said statute involving the holding as matter of law that said statute was applicable to the facts so stated in the indictment only as it denounces the making of contracts in restraint of trade and commerce among the several States and with foreign nations.

37.

Having so treated as a general demurrer the first separate special plea in bar of Defendant Kissel, the court erred in not over-
146 ruling such demurrer as being a demurrer merely raising a

question as to the running of the statute of limitations, which question cannot be raised by demurrer.

38.

Having so treated as a general demurrer the special plea in bar of Defendant Harned, the court erred in not overruling such demurrer as being a demurrer merely raising a question as to the running of the statute of limitations, which question cannot be raised by demurrer.

39.

In looking at the whole record, upon the filing of the special demurrer of the United States to the first separate special plea in bar of Defendant Kissel, in order to ascertain which party was first in fault, the court erred in rendering its decision and judgment dismissing, quashing, and setting aside the indictment in this case upon a construction of the act of Congress approved July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies" (it being the statute upon which said indictment was founded) such that the court held as a matter of law that such statute was applicable to the facts stated in the indictment only as it denounces the making of contracts in restraint of trade and commerce among the several States and with foreign nations, such offenses not being continuing offenses in their nature, and not as it denounces the continuing offenses of engaging in conspiracies in restraint of such trade and commerce, and the monopolizing of, and attempting to monopolize, and conspiring of persons and corporations together to monopolize the same, in said statute mentioned and in terms charged in said indictment.

147 40.

In looking at the whole record, upon the filing of the special demurrer of the United States to the special plea in bar of Defendant Harned, in order to ascertain which party was first in fault, the court erred in rendering its decision and judgment, dismissing, quashing, and setting aside the indictment in this case upon a construction of the act of Congress approved July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies" (it being the statute upon which said indictment was founded) such that the court held as a matter of law that such statute was applicable to the facts stated in the indictment only as it denounces the making of contracts in restraint of trade and commerce among the several States and with foreign nations, such offenses not being continuing offenses in their nature, and not as it denounces the continuing offenses of engaging in conspiracies in restraint of such trade and commerce, and the monopolizing of, and attempting to

monopolize, and conspiring of persons and corporations together to monopolize the same, in said statute mentioned and in terms charged in said indictment.

41.

In looking at the whole record, upon the filing of the special demurrer of the United States to the first separate special plea in bar of the Defendant Kissel, in order to ascertain which party was first in fault, the court erred in dismissing the indictment upon a construction of the statute upon which the indictment was founded to the effect that the word conspiracy as used in that statute has substantially the same meaning as the word contract.

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42.

In looking at the whole record, upon the filing of the special demurrer of the United States to the special plea in bar of the Defendant Harned, in order to ascertain which party was first in fault, the court erred in dismissing the indictment upon a construction of the statute upon which the indictment was founded to the effect that the word conspiracy as used in that statute has substantially the same meaning as the word contract.

43.

The court erred in rendering its decision dismissing, quashing, and setting aside the indictment in this case as to the Defendant Kissel upon the ground that the facts charged therein did not constitute any offense against the United States within the meaning of the act of Congress approved July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," that being the statute upon which said indictment was founded, except the offense of making, more than three years before the indictment was found, a contract in restraint of trade and commerce among the several States and with foreign nations.

44.

The court erred in rendering its decision dismissing, quashing, and setting aside the indictment in this case as to the Defendant Harned, upon the ground that the facts charged therein did not constitute any offense against the United States within the meaning of the act of Congress approved July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," that being the statute upon which said indictment was founded, except the offense of making, more than three years before the indictment was found, a contract in restraint of trade and commerce among the several States and with foreign nations.

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45.

The court erred in dismissing the indictment in this case immediately upon the overruling of the special demurrer of the United States to the first separate special plea in bar filed by the Defendant Kissel without giving the United States an opportunity to traverse said plea, it being a plea seeking to bar prosecution of that defendant under said indictment by reason of the fact alleged in said plea that said indictment was not found within three years next after the offense therein charged was committed, and by reason of the provisions of section 1044 of the Revised Statutes of the United States, and said special demurrer being based upon the fact that such plea amounts to a plea of the general issue when interposed to an indictment, such as the one in this case, charging an offense continuing in its nature and charging defendants with continuously committing such offense throughout the period of six years next preceding the finding and presentation of the indictment.

46.

The court erred in dismissing the indictment in this case immediately upon overruling the special demurrer of the United States to the special plea in bar filed by the Defendant Harned and without giving the United States an opportunity to traverse said plea, it being a plea seeking to bar prosecution of that defendant under said indictment by reason of the fact alleged in said plea that said indictment was not found within three years next after the offense therein charged was committed, and by reason of the provisions of section

150 1044 of the Revised Statutes of the United States, and said special demurrer being based upon the fact that such plea amounts to a plea of the general issue when interposed to an indictment, such as the one in this case, charging an offense continuing in its nature and charging the defendants with continuously committing such offense throughout the period of six years next preceding the finding and presentation of the indictment.

47.

The court erred in not deciding that the first separate special plea in bar of the Defendant Gustav E. Kissel, filed July 29, 1909, attempting to set up the statute of limitations, was insufficient in law to show that the statute of limitations had run.

48.

The court erred in not deciding that the special plea in bar of the Defendant Thomas B. Harned, filed August 3rd, 1909, attempting to set up the statute of limitations, was insufficient in law to show that the statute of limitations had run.

49.

The court erred in not deciding that the first separate special plea in bar of the Defendant Gustav E. Kissel, filed July 29, 1909, attempting to set up the statute of limitations was bad, because it traversed specific allegations contained in the indictment not properly traversable in said plea.

151 50.

The court erred in not deciding that the special plea in bar of the defendant Thomas B. Harned filed August 3rd, 1909, attempting to set up the statute of limitations was bad, because it traversed specific allegations contained in the indictment not properly traversable in said plea.

And the United States aforesaid, plaintiff in error, prays that the order entered herein overruling the said demurrers interposed by the United States to said special pleas and sustaining the said pleas as sufficient in law and denying the motion of the United States to have said plea treated as a plea of not guilty and directing the entry of judgment overruling the said several demurrers and each of them, sustaining the said pleas, denying said motion and dismissing the said indictment as to the defendants Kissel and Harned and the judgment entered thereon and in accordance therewith for the errors aforesaid and other errors in the record and proceedings herein may be reversed and altogether held for nothing, and that the plaintiff in error may be restored to all things which it has lost by reason of said order and judgment and that the Circuit Court of the United States for the Southern District of New York be directed to vacate and set aside said order and to overrule said special pleas and to enter judgment accordingly.

Dated New York, December 8, 1909.

HENRY A. WISE,
United States Attorney in and for
the Southern District of New York,
Attorney for Plaintiff in Error.

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed Dec. 8, 1909. John A. Shields, clerk.

152 *By the Honorable . one of the judges of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit, to Gustav E. Kissel and Thomas B. Harned, greeting:*

You are hereby cited and admonished to be and appear before the United States Supreme Court, to be holden at the city of Washington, in the District of Columbia, on the fifth day of January, 1910, pursuant to an order and writ of error filed in the clerk's office of the

Circuit Court of the United States for the Southern District of New York, wherein the United States of America is plaintiff in error and you are defendants in error, and you are to show cause, if any there be, why the order and judgment in said order and writ of error mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan, in the city of New York, in the district and circuit above named, this eighth day of December, in the year of our Lord one thousand nine hundred and nine, and of the Independence of the United States the one hundred and thirty-fourth.

GEO. C. HOLT,
Judge of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

153 Indorsement: United States Circuit Court, Southern District of New York. United States of America, plaintiff in error, against Gustav E. Kissel and Thomas B. Harned, defendants in error. Citation. U. S. Circuit Court, Southern District N. Y. Filed Dec. 8, 1909. John A. Shields, clerk. Service of a copy of the within citation is hereby admitted. Dated New York, Dec. 8, 1909. William C. Osborn, atty. for Deft. Kessel. Hunt, Hill & Betts, attys. for Deft. Harned.

(Indorsement on cover:) File No. 21940. S. New York, C. C. U. S. Term No. 714. The United States, plaintiff in error, vs. Gustav E. Kissel and Thomas B. Harned. Filed December 23d, 1909. File No. 21940.

In the Supreme Court of the United States.

OCTOBER TERM, 1909.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
GUSTAV E. KISSEL AND THOMAS B. HARNED. } No. 714.

MOTION TO ADVANCE.

On July 1, 1909, the American Sugar Refining Company and its directors, together with certain other persons, including the defendants in error here, were indicted in the Circuit Court of the United States for the Southern District of New York for conspiring to restrain interstate commerce in violation of the Sherman antitrust act of July 2, 1890. The indictment alleged, in substance, that the defendants conspired to prevent the Pennsylvania Sugar Refining Company from doing business; that this result was accomplished; that the defendant Kissel, acting secretly as agent of the American Sugar Refining Company, made a contract to loan to one Adolph Segal $1,250,000 upon a note of Segal's, secured by certain collateral, among which was a majority of the stock of the Pennsylvania Sugar Refining Company; that, having thus obtained a majority of the stock, a new board of directors in the interest of the American Sugar Refining Company

In the Supreme Court of the United States.

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was elected; that said board immediately voted to close the refinery of the Pennsylvania Sugar Refining Company; that this was done, and that company has since done no business.

The defendants pleaded in bar of the prosecution the statute of limitations; that the execution of the contract between Kissel and Segal and the other acts leading up to and including the closing of the Pennsylvania Sugar Refining Company's refinery were all done and the entire transaction closed in all respects on or before January 4, 1904. The Government, on the other hand, contended that the keeping of the refinery closed, in accordance with the conspiracy, constitutes a continuing offense.

To these pleas in bar the Government filed demurrers, which demurrers were overruled, the pleas in bar sustained, and the indictment dismissed. From this judgment the Government sued out a writ of error under the act of March 2, 1907 (34 Stat., 1246); and, in accordance with the requirement of that act, that cases under it "shall be diligently prosecuted and shall have precedence over all other cases," the Solicitor-General moves the court to advance the case on the docket and set it down for hearing on an early day during the next term of the court.

Notice of this motion has been served upon opposing counsel.

LLOYD W. BOWERS,
Solicitor-General.

APRIL, 1910.

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In the Supreme Court of the United States.

OCTOBER TERM, 1910.

THE UNITED STATES, PLAINTIFF IN error,
v.
GUSTAV E. KISSEL AND THOMAS B. Harned.
} No. 390.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This case is here on writ of error issued under the Criminal Appeals Act to the Circuit Court of the United States for the Southern District of New York for review of a judgment of that court sustaining pleas of the statute of limitations interposed separately by Kissel and Harned to an indictment charging them, beside the American Sugar Refining Company (hereafter called the American Company) and six other persons, directors of the American Company, with (1) conspiring to restrain interstate

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and foreign commerce, (2) monopolizing such commerce, (3) attempting to monopolize such commerce, and (4) conspiring to monopolize such commerce. The indictment was filed July 1, 1909 (Rec. 31). The United States demurred to defendants' pleas of the statute of limitations (Rec., 54, 55); and the demurrer was overruled (Rec., 62, 63, 65, 66). The United States not asking leave to file replication to the plea, the judgment sustaining the plea also dismissed the indictment (Rec., 63, 66).

Defendant Kissel, beside his plea of the statute of limitations, filed a plea of immunity from prosecution, on the general ground that upon the trial of a civil case for damages brought by the Pennsylvania Sugar Refining Company (hereafter called the Pennsylvania Company) against the American Company, himself and others for a part of the same acts as are the subject of the present indictment, he (Kissel), on or shortly after May 26, 1909, produced in court, in obedience to a subpœna, certain documents relating to the matters charged in the indictment. (Rec., 35–51.) This plea of immunity, however, is not now before this court, for reasons stated in the argument. Defendant Harned filed only his plea of the statute of limitations. (Rec., 52.)

In the stated civil action of the Pennsylvania Company against the American Company, Kissel and others, a judgment of dismissal upon the ground that the complaint failed to state a cause of action was reversed by the Court of Appeals for the Second Circuit; and that court's opinion and decision are

reported in *Pennsylvania Sugar Refining Company* v. *American Sugar Refining Company* (166 Fed., 254).

Of the 14 counts of the indictment, counts 1, 5, and 9 charge conspiracy in restraint of commerce; counts 2, 6, and 10 charge monopolizing; counts 3, 7, and 11 charge attempts to monopolize; and counts 4, 8, and 12 charge conspiracy to monopolize. The differences between the three counts in each of these four groups are that the first of the three counts in each group relates to interstate commerce in refined sugar; the second relates to interstate commerce in raw sugar and molasses; and the third relates to foreign commerce in raw sugar and molasses. Count 13 is a combined charge of conspiracy in restraint of interstate and foreign commerce in raw sugar and molasses and in restraint of interstate commerce in refined sugar. Count 14 is a combined charge of monopolizing, attempting to monopolize, and conspiring to monopolize interstate and foreign commerce in raw sugar and molasses and interstate commerce in refined sugar. (Rec., 3–31.)

As, however, all 14 counts of the indictment relate to the same detailed facts, a single outline of them will suffice; and the argument also may be confined to the first count, because its discussion may be applied readily to the other counts, and reference at all times to all four of the different sorts of alleged offenses, viz, conspiracy in restraint of commerce, monopolizing, attempting to monopolize and conspiring to monopolize, would introduce intolerable confusion.

The skeleton facts charged in the indictment (Rec., 3–18), in aid of all the counts, are:

The American Company during the whole period involved in the controversy has been a corporation of New Jersey engaged in the business of buying and selling raw sugar and molasses in interstate and foreign commerce, manufacturing refined sugar, and selling that sugar in interstate commerce. It has had and controlled 90 per cent of such business. (Rec., 3, 4.) The Pennsylvania Company was organized as a corporation of Pennsylvania for the purpose of doing business of like character with that of the American Company; it continued in existence up to the time of the indictment, and on December 30, 1903, it was ready for business, having completed a large sugar manufacturing plant at Philadelphia and otherwise equipped itself for business at an outlay of at least $2,000,000. (Rec., 4.) From that time on the Pennsylvania Company would have carried on its business in competition with the American Company "if it had not been for the unlawful and corrupt conduct of said corporation defendant [i. e., the American Company], of its said directors," and of the other defendants in this indictment, as detailed in the indictment. (Rec., 4.) The conspiracy charged to have been begun on December 30, 1903, and repeatedly alleged to have existed continuously up to the indictment (Rec., 5, 6, 18), had the object of putting and *keeping* the Pennsylvania Company out of business and competition with the

American Company for an indefinite period—as long as possible. (Rec., 5, 6, 18.)

The initial or principal steps in the conspiracy (and they were promptly taken) were to be—as can hardly be abbreviated with necessary accuracy from the following vital parts of the indictment:

First. One Adolph Segal, of said city of Philadelphia, being on said thirtieth day of December, in the year nineteen hundred and three, the treasurer of the Champion Construction Company, a corporation, and the owner and holder of a majority of its capital stock, and said Champion Construction Company being the owner and holder of a majority, to wit, twenty-six thousand out of a total of fifty thousand of the shares of the capital stock of said Pennsylvania Sugar Refining Company, and said Adolph Segal therefore being the virtual owner and holder of a controlling interest in the stock of said Pennsylvania Sugar Refining Company; and said corporation and individual defendants then having knowledge of said facts pertaining to said Adolph Segal's said stock ownership in and control of said Champion Construction Company and Pennsylvania Sugar Refining Company, said corporation and individual defendants were to get from said Champion Construction Company, through said Adolph Segal, for said corporation defendant, the possession, use, and control of and the authority to vote said shares of capital stock in, and thereby secure the power of control over and management of said Pennsylvania Sugar Refining Company

for the term of one year at least, to be accomplished by inducing said Adolph Segal to borrow, for the term of one year from the fourth day of the then next succeeding month of January, from said Gustav E. Kissel, acting as a broker and as the agent for a lender whose identity was not to be by him or any of said defendants disclosed to said Adolph Segal, but which lender was in fact to be said corporation defendant, a large sum of money, to wit, of the sum of twelve hundred and fifty thousand dollars, at six per cent interest, for use in his business as a promoter of hotel and manufacturing enterprises, and to transfer to said Gustav E. Kissel, together with other security for the repayment of said sum of money, written authority to exercise the power of voting as a holder of said twenty-six thousand shares of stock of said Pennsylvania Sugar Refining Company without said Adolph Segal being aware of the fact that said corporation defendant would be the real lender of such sum of money to him and without his suspecting the designs of said corporation and individual defendants in the premises, or having reason to suppose that such undisclosed lender would have any other desire but one to obtain the interest upon and the repayment of such sum when due, or any motive for preventing said Pennsylvania Sugar Refining Company from carrying on its said intended business, trade, and commerce, and thereby earning profits and paying dividends to its stockholders in such a way as to enable said Adolph Segal to pay such interest and

repay such principal sum so to be borrowed; it being a fact, as the grand jurors aforesaid, upon their oath aforesaid, charge it to be, that, as said corporation and individual defendants then well knew, said Adolph Segal would be dependent upon such dividends for moneys with which to pay such interest and repay such borrowed sum and, in the event of said Pennsylvania Sugar Refining Company's failure to carry on its said business, trade, and commerce and pay such dividends, his financial affairs would be put in a ruinous condition, and the hold of said corporation defendant upon him and upon said Pennsylvania Sugar Refining Company, by reason of such his obligations to said corporation defendant, continued and greatly strengthened.

Second. When the power of control over and management of said Pennsylvania Sugar Refining Company should be so acquired by said corporation defendant for the term of one year in the manner aforesaid, said corporation and individual defendants were to use every means in their power to extend said term and said power of control, particularly by keeping said Adolph Segal involved in debt and his affairs in such a condition as to prevent his relieving himself from his obligations to said corporation defendant, and by wrongfully and arbitrarily refusing to accept payment of such obligations from him either before or at their maturity, or to surrender to him such power of control over and management of said Pennsylvania Sugar Refining Company.

Third. When the power of control over and management of said Pennsylvania Sugar Refining Company should be so acquired by said corporation and individual defendants in the manner aforesaid, said corporation and individual defendants were to make use of the same to prevent said Pennsylvania Sugar Refining Company from engaging in or carrying on, in whole or in part, the business, trade, and commerce which it was so organized for carrying on, and had so prepared to carry on, and so intended to carry on, as aforesaid; and were thereby to bring about the ruin of said Pennsylvania Sugar Refining Company through inaction, and the destruction of its said property and facilities through decay, and eliminate and entirely prevent the competition with said corporation defendant which would, but for the acts of said corporation and individual defendants in the premises, come into existence through the operation of said Pennsylvania Sugar Refining Company. (Rec., 5, 6.)

Execution of the conspiracy began speedily and vigorously. On December 30, 1903, the agreement between Segal and Kissel, a broker, and acting as agent for an undisclosed principal, the American Company, was executed; of which the salient points are that Segal was loaned $1,250,000 for which he gave Kissel as security 26,000 shares, a majority, of the stock of the Pennsylvania Company "with the right to the stock and all voting and other rights which belong to it;" the collateral for the loan also

embraced $500,000 of the bonds of the Pennsylvania Company, secured by a mortgage of the company's property; Segal agreed that he would "so arrange that the absolute voting power for the said 26,000 shares of the stock of the Pennsylvania Sugar Refining Company shall be in the lenders; that the lenders shall have the right to use such voting power as may be suitable to aid or effectuate the purposes hereof; and *as the control thereby given is a material part of the consideration* for the said note the borrower further agrees that he will so arrange that of the seven directors of the said Pennsylvania Sugar Refining Company, four to be nominated by the lenders, of whom one shall be the said Gustav E. Kissel, shall be put in place of four of the present directors; that they, or substitutes to be nominated by the lenders, shall be directors so long as any part of the loan shall remain unpaid (Rec., 9); Segal further agreed "that the control and possession of the property of the said the Pennsylvania Sugar Refining Company shall be in such way and *so effectually subjected to the control of the board of directors* that so long as the note, or any part thereof, remains unpaid the refinery of the said the Pennsylvania Sugar Refining Company *shall only be run or operated or do business as shall be directed* by such board of directors" (Rec., 9).

The Champion Construction Company, of which defendant Harned was president and Segal was treasurer, and of which Segal owned a controlling

Third. When the power of control over and management of said Pennsylvania Sugar Refining Company should be so acquired by said corporation and individual defendants in the manner aforesaid, said corporation and individual defendants were to make use of the same to prevent said Pennsylvania Sugar Refining Company from engaging in or carrying on, in whole or in part, the business, trade, and commerce which it was so organized for carrying on, and had so prepared to carry on, and so intended to carry on, as aforesaid; and were thereby to bring about the ruin of said Pennsylvania Sugar Refining Company through inaction, and the destruction of its said property and facilities through decay, and eliminate and entirely prevent the competition with said corporation defendant which would, but for the acts of said corporation and individual defendants in the premises, come into existence through the operation of said Pennsylvania Sugar Refining Company. (Rec., 5, 6.)

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The Champion Construction Company, of which defendant Harned was president and Segal was treasurer, and of which Segal owned a controlling

amount of stock (Rec., 5), thereupon promptly executed a written consent "that the 26,000 shares of the capital stock of the Pennsylvania Sugar Refining Company, mentioned in" the agreement of Kissel and Segal, "shall be used as therein provided." (Rec., 9, 10.) Still on the same day, December 30, 1903, the Champion Construction Company, by its president, defendant Harned, executed a power of attorney to Kissel and any persons whom he might substitute as the grantee of the power to vote the 26,000 shares of stock of the Pennsylvania Company in electing directors of the Pennsylvania Company or in any other action; and this proxy was made irrevocable so long as Segal's debt remained unpaid. (Rec., 10.) At once directors in the interest of the American Company, including Kissel, were substituted for old directors on the board of the Pennsylvania Company, and still on December 30, 1903, the new board of directors of the Pennsylvania Company, with the help of Kissel's vote, ordered that the Pennsylvania Company "*should thereafter refrain from carrying on its business until the further order of said board of directors.*" (Rec., 10, 11.) As a natural result, and indeed after more delay than might have been expected, the Pennsylvania Company (as Kissel's own plea informs us) went into a receiver's hands on October 2, 1906 (Rec., 33), from which that company had not emerged in July, 1909. (Rec., 33.)

Many overt acts, beside the foregoing—seventeen in all (Rec., 7–18)—are alleged in the indictment,

including five such acts done within three years of the filing of the indictment by other defendants than Kissel and Harned, and three such acts done within those three years by Kissel himself. As, however, these eight acts, charged to have been done within three years of the filing of the indictment, are claimed by defendants to have been incapable of operating as "overt acts," because (as is said) they could not possibly tend to effect the object of the conspiracy, it is better not to detail them here but to refer to their exact description and the discussion of their character and tendency in pages 56–66 of the following argument.

The limitation pleas filed by Kissel and Harned are essentially alike. (Rec., 32–34; 52–54.) They both are of complex and peculiar form, departing widely from a simple statement that the offenses charged upon defendants were not committed within three years of the filing of the indictment. Their character is described and their effect is considered on pages 68–71 of the argument.

The opinion of Judge Holt, given below, is found on pages 56–61 of the record.

ASSIGNMENT OF ERRORS.

The Circuit Court erred—

(1) In overruling the demurrers of the United States to the pleas of the statute of limitations.

(2) In sustaining either Kissel's or Harned's plea of the statute of limitations.

(3) In dismissing the indictment as to Kissel.

(4) In dismissing the indictment as to Harned.

ARGUMENT.

Stating in the briefest form the points that are given with more fullness and accuracy at the commencement of their particular discussion, I shall argue:

First. The immunity plea of Kissel is not now before the court.

Second. A special plea of the statute of limitations is not allowable in Federal criminal procedure; or, if allowable at all, it must admit all the allegations of the indictment like a demurrer.

Third. Consequently, as well as because the Circuit Court so treated them, the limitation pleas must be taken as admitting what the indictment avers.

Fourth. The indictment is good on its face, both because no overt act is necessary within three years of prosecution if the conspiracy agreement or confederation continues to exist within those three years, and also because overt acts were done under this conspiracy within three years of the filing of the indictment both by the other defendants than Kissel and Harned and also by Kissel himself.

Fifth. The pleas, at any rate, can not raise an issue on any point but the time of the alleged offense; and, as defendants' pleas do make certain other issues, they are duplicitous and usurp the office of a plea of not guilty.

Sixth. In their true construction, however, the pleas admit continuance of the conspiracy within three years of the indictment; and therefore they

are bad, as no overt act within three years is necessary.

Seventh. Even if the judgment of the Circuit Court is not reversed, it should be modified by this court so as to allow the United States still to reply to the pleas, and so to have the question whether the conspiracy actually existed within three years tried on its merits by a jury.

Treating these points successively—

FIRST.

Kissel's plea of immunity from prosecution is not now before this court.

1. The judgment of the Circuit Court in terms relates to, and acts upon, the limitation pleas alone. The demurrers which were sustained are addressed only to the limitation pleas (Rec., 54, 55), and the pleas declared to be sustained are only the limitation pleas (Rec., 62, 63, 65, 66). Neither the order for judgment nor the judgment, as the references just given will show, considers or determines the immunity plea in any way.

While the indictment was dismissed by the judgment of the Circuit Court, that result necessarily followed from holding the limitation pleas good. It was not necessary to pass upon the immunity plea. The Criminal Appeals Act, in allowing the Government to appeal "from the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy" (34 Stat., 1246), does not bring into this court any other question than the propriety of the special plea which is actually upheld.

2. The record does not disclose what action the United States took concerning Kissel's immunity plea. Neither demurrer, replication, nor motion of any kind concerning that plea is shown. Nor does it appear whether the United States has yet been ordered to plead to the immunity plea. *Non constat*, therefore, whether the United States demurred to the immunity plea or made replication to it, or whether the United States has had to plead at all to that plea, or whether it is yet in default for not so pleading. If the United States did demur to that plea, that demurrer has not yet been disposed of in the Circuit Court, but still stands.

3. Defendant Harned filed no immunity plea.

SECOND.

It is doubtful whether a special plea of the statute of limitations is allowable at all in Federal criminal procedure; but, if it be, such plea must be in confession and avoidance of all the allegations of the indictment charging the offense. In other words, a special plea of the statute of limitations may properly be used in Federal criminal procedure only as a demurrer or to traverse an allegation of the indictment made in anticipation of a defense of the statute of limitations, such as an allegation that defendant has been a fugitive from justice. The plea never can traverse any allegation of the indictment charging the offense.

A. The plea ought not to be allowed in any case, and defendant should be left to assert the defense under the plea of not guilty, as he may.

1. It is beyond dispute that the plea of not guilty embraces a defense of the statute of limitations in a criminal proceeding.

Rex v. *Sidney*, 9 State Trials (Howell) 817, 820, 821.

Streep v. *United States*, 160 U. S., 128.

United States v. *Brown*, 2 Lowell, 267.

Hatwood v. *State*, 18 Ind., 492.

Wharton's Criminal Pleading and Practice. (9th ed., 1889, sec. 317.)

1 Bishop's Criminal Procedure, sec. 799.

In *Streep* v. *United States, supra*, the statute of limitations was raised at the trial under the plea of not guilty, in the following manner:

> I ask your honor to direct the jury to acquit on the ground that it appears from the indictment and the files, the records of this court, and from the testimony, that the offense, if any, was committed more than three years prior to the time of filing the indictment. (Record of case, p. 29.)

The availability of the general issue will likewise appear from the entire absence of any special plea of the statute of limitations in English criminal procedure.

2. A special plea of the statute of limitations has never been known in English criminal procedure.

Chitty's Criminal Law (5th Am. Ed., 1847), pp. 445–480.

Archbold's Criminal Procedure (8th Ed., Pomeroy, 1880), pp. 336–354.

Stephen's Digest of the Law of Criminal Procedure, Article 263, p. 173.

2 Russell on Crimes (7th Eng. Ed., 1910), p. 1981 et seq.

Stephen says: "There are four pleas in bar, namely, not guilty, autrefoits acquit, autrefoits convict, and pardon." (Art. 263.)

Federal criminal procedure is that of England, except as altered by congressional enactment; and state statutes have no pertinence. The impropriety of a special plea of the statute of limitations in England ought to determine the matter for the Federal courts, unless it be found that this court has sanctioned the plea. There is no Federal statute concerning the question.

3. Modern legislation in the States excludes the plea. Thus, section 4359 of the Iowa Code of 1873 declares:

> There are but three pleas to an indictment. A plea of:
>
> 1. Guilty.
> 2. Not guilty.
> 3. A former judgment of conviction or acquittal of the offense charged, which may be pleaded with or without the plea of not guilty.

This section has been held to forbid a special plea of the statute of limitations. (*State* v. *Whalen*, 98 Iowa, 662, 668–669.) The Iowa code of to-day retains the same provision. (Annotated Code of Iowa, 1897, sec. 5333, p. 2035.)

The Criminal Code of New York likewise limits pleas in bar to guilty, not guilty, and former conviction or acquittal. (N. Y. Code of Criminal Procedure, 1881, sec. 332; id., as edited by Parker and repub-

lished by Banks Co., 1905.) The legislation of Canada is the same; the criminal code providing—

> The following special pleas and no others may be pleaded according to the provisions hereinafter contained, that is to say, a plea of *autrefois acquit*, a plea of *autrefois convict*, a plea of pardon, and such pleas in cases of defamatory libel as are hereinafter mentioned.
>
> 2. All other grounds of defense may be relied on under the plea of not guilty. (Revised Statutes of Canada, 1906, vol. 3, ch. 146, sec. 905, p. 247.)

These illustrative pieces of legislation, beside conforming to the historical rule in England, show that it rests upon good policy. Indeed, in the States generally pleas in bar to indictments are now seldom used, the general issue taking their place. Chief Justice Bigelow said, as long ago as 1866:

> Here, however, as in England, special pleas in bar to indictments are now seldom used, except in a few cases, the usual practice being to plead the general issue and give any special ground of excuse, justification or exemption, in evidence under the general issue. (*Nauer* v. *Thomas*, 95 Mass., 572, 579.)

4. Federal authority leaves the question quite open, unless the cases of *United States* v. *Norton* (91 U. S., 566) and *United States* v. *Hirsch* (100 U. S., 33), give the plea a general sanction.

Each of these cases came to this court on a certificate of difference in opinion among the circuit judges,

and the question decided in the cases was therefore presented by the inquiry of the circuit judges. In neither case was the propriety or scope of the plea of the statute of limitations discussed or considered in this court.

The only other cases in this court needing mention are *United States* v. *Hewecker* (164 U. S., 46) and *United States* v. *Irvine* (98 U. S., 450).

The *Hewecker* case was dismissed for want of jurisdiction, and therefore held nothing but the jurisdictional point. In the *Irvine* case (likewise coming to this court on certificate of difference of opinion below) the question of the statute of limitations was in fact presented under a plea of not guilty, an attempt at a special plea of the statute having been abandoned by defendant below. The record of the *Irvine* case discloses the proceedings as follows:

Defendant first put in this anomalous plea, "that said indictment aforesaid was not found within two years next before said offense is therein alleged and charged to have been committed." (Rec., *United States* v. *Irvine*, p. 11.) This plea, of course, was pure nonsense, because it complained that the indictment was not found before the offense. Thereafter defendant pleaded not guilty, and issue was joined on that plea alone. (Rec., pp. 4 and 5.) This court, in saying in its opinion that "the defendant pleaded the statute of limitations of two years as a bar," etc. (p. 451), undoubtedly referred to the fact that, as the record of the case discloses, "defendant asked

the court to instruct the jury to acquit him because the offense was barred by the statute of limitations; which the court refused to do." (Rec., pp. 4, 5, 13; quotation from certificate, p. 13.) It is thus apparent that in the *Irvine* case the defense of the statute of limitations was presented under the plea of not guilty, rather than by a special plea.

There is nothing more in this court; except that, as already seen, the statute of limitations was likewise raised under the general issue in the *Streep* case (160 U. S., 128). The case of *Adams* v. *Woods* (2 Cranch, 336), is entirely distinguished by the fact that it was a civil action, and so was subject to the rules governing civil cases. (*Hepner* v. *United States*, 213 U. S., 103.)

Turning to the lower Federal courts, the distinction just stated concerning *Adams* v. *Woods* disposes of—

United States v. *Perkins*, 4 Cliff., 321.
McGlinchy v. *United States*, 4 Cliff., 312.
Stimpson v. *Pond*, 2 Curtis, 502.
United States v. *Platt*, 27 Fed. Cas. No. 16054a; p. 546.
United States v. *Mayo*, 1 Gall., 396.
United States v. *Maillard*, 4 Ben., 459.

All the foregoing were civil actions.

Of the other Federal cases cited for defendant below, *United States* v. *Wells* (163 Fed., 313), arose on demurrer. In *United States* v. *Shorey* (27 Fed. Cas. No. 16280, p. 1070), defendant pleaded both not guilty and the statute of limitations. The latter plea was accordingly stricken out. The case is an author-

ity against double pleading in criminal prosecutions. We have left, of defendants' citations below, simply *United States* v. *Slacum* (1 Cranch, C. C., 485); *United States* v. *Wright* (28 Fed. Cas. No. 16770, p. 789); *United States* v. *Comstock* (162 Fed., 416), and *United States* v. *Brace* (149 Fed., 874). These four cases seem to be all that exist in the lower Federal reports where a special plea of the statute of limitations was entertained, whether on the merits it was upheld or overruled; and in these four cases, as in the *Norton* and *Hirsch* cases in this court, the propriety of such a plea was not questioned or considered.

The foregoing history of the use in a criminal case of the special plea of the statute of limitations in the Federal courts seems to leave open the question whether that plea may properly be used; and, if it be open, the question ought to be answered according to the continuous English precedent and the example and policy of modern American legislation. Defendant under an indictment does not need the special plea, for he can have like benefit of the statute of limitations under the general issue.

B. *If the special plea be allowable at all, its use certainly must be restricted so as to act as a demurrer to the indictment or as a traverse of nothing more than such allegation as may be in the indictment in mere anticipation of a defense of the statute of limitations; such as an allegation that defendant has been a fugitive from justice.* In other words, the plea must not traverse any material allegation of the indictment relating to the merits—i. e., averring any fact concerning the

commission of the crime. Unless the plea is so restricted, it usurps the office of the plea of not guilty, and its use will lead to various and serious confusion, delay, and difficulty. On the other hand, use of the special plea under the indicated restriction will accomplish every proper purpose that can be claimed for it.

1. There is not a Federal case in any court, so far as I have been able to find, which gives to the special plea a wider scope than I claim that it should have.

In *United States* v. *Norton* (91 U. S., 566) the question was whether a two-year or a five-year period of limitation was applicable. If the former, the indictment itself showed the prosecution to be too late; and so it was held. The decision therefore was necessary, though the plea admitted the allegations of the indictment.

In *United States* v. *Irvine* (98 U. S., 450), while the question arose under the general issue (as already shown), the decision was that the statute began to run when money was first withheld by a pension agent, and that the continuous withholding was not a continuing offense; and, as the indictment itself showed that the money was first withheld nearly five years before the indictment was found, the prosecution was too late on the allegations of the indictment itself.

In *United States* v. *Hirsch* (100 U. S., 33), the first and second counts of the indictment charged conspiracies, entered into, respectively, on September 1, 1873, and September 13, 1873, and not continuing beyond September 14, 1873. (Rec., *United States* v.

Hirsch, pp. 1–4.) The other two counts of the indictment alleged entries of goods at a custom-house by means of fraudulent invoices and false classification in or later than September, 1873. The indictment was found February 3, 1877. The question was whether the ordinary three-year statute or the special five-year statute concerning crimes under the revenue laws was applicable. This court held the three-year statute applicable to the first two counts and the five-year statute applicable to the other counts. On the face of the indictment therefore the first two counts were barred and the other two counts were not barred. It was so determined. The special plea of the statute of limitations was therefore given the very effect which the allegations of the indictment itself necessitated.

In none of the cases in this court, therefore, has the plea been used as a traverse of any allegation of an indictment concerning the fact or time of commission of the offense charged. Such judgment has always been given upon the plea as was consistent with the indictment. The same is true of the inferior courts' decisions. We have here only to consider those four cases in which, as previously shown, a special plea of the statute of limitations has been acted upon in a criminal case in the lower courts, viz:

United States v. *Slacum*, 1 Cranch, C. C., 485.

United States v. *Wright*, 28 Fed. Cas., No. 16770.

United States v. *Comstock*, 162 Fed., 416.

United States v. *Brace*, 149 Fed., 874.

In *United States* v. *Slacum* the report does not show what the allegations of the indictment were; so that it does not appear whether the plea was inconsistent with the indictment or not. The case therefore has no pertinence. In *United States* v. *Wright* defendant pleaded a two-year statute, and the plea was held bad because a five-year period was applicable. No question of inconsistency between the plea and the averments of the indictment could have been involved; because the plea itself admitted the offense to have been committed within five years. *United States* v. *Comstock* is of identical character with the *Wright* case. The plea claimed that the offense was not committed within one year of the indictment; it therefore admitted that it was committed within three years; and the court held the three-year statute applicable and the plea therefore bad. In *United States* v. *Brace* we have a positive authority for treating the special plea as a demurrer. The indictment charged that the defendants entered into a conspiracy on May 25, 1902, that certain overt acts were done between June 10, 1902, and September 15, 1902, and that the conspiracy was continuously in execution until the last-named date.

The indictment was found September 8, 1905. Defendant interposed a special plea that more than three years, viz, three years and eighty-nine days, had elapsed between the commission of the crime and the finding of the indictment. The United States demurred, and the plea was overruled on the ground, among others, that the indictment showed an overt act to have been done and the conspiracy to have

continued within three years of the finding of the indictment. Had the plea been treated as a traverse of the indictment, it would have had to be sustained; for the applicable statute of limitations fixed a three-year period of limitation and the plea averred that the offense was not committed within three years. The court therefore reached its judgment by treating the plea like a demurrer.

The summary result of the foregoing is that a Federal court has never yet allowed a special plea of the statute of limitations as a traverse of the allegations of the indictment concerning the fact or time of committing the offense. The plea has always led to a judgment consistent with the allegations of the indictment.

2. Use of the special plea as a traverse of any allegations concerning the fact or time of committing the offense charged would lead to confusion, difficulty, and delay.

If the special plea is permitted to operate as a traverse of anything concerning the merits, a jury trial on that traverse will be necessary; and such jury trial will necessarily be separate from and precede a later trial on the general merits if a plea of not guilty is later interposed. This results because the special plea can not be offered concurrently with a plea of not guilty, but must precede it. Double pleading is not permitted in criminal procedure; and such a special plea as the statute of limitation must be put in before the general issue.

1 Chitty's Criminal Law (5th Am. Ed., by Perkins), Star, pp. 434, 435.

Wharton's Criminal Pleading and Practice (9th Ed.), sec. 419.

United States v. *Shorey*, 27 Fed. Cas., No. 16, 280, p. 1070.

State v. *Ward*, 49 Conn., 429.

If any traverse of any part of the merits by a special plea is found by the jury for defendant, no question will arise concerning the effect of this verdict on a subsequent trial under a plea of not guilty, because the maintenance of the special plea will end the case; but, even with this outcome of the trial on the special plea, peculiar questions will arise on that trial. For instance, where is the burden of proof—on defendant to maintain his plea, or on the State to negative it? Also, will the rule that the State must show defendants' guilt beyond a reasonable doubt apply on the trial of the issue under defendants' special plea?

If, however, the jury find for the State on the issue made by a traverse of any part of the merits in a special plea by defendant, difficulties of another and more serious kind will arise which ought to be conclusive against allowing a special plea as a traverse. Will the verdict of the jury on the traverse estop defendant on the traversed point when later trial is had under a plea of not guilty? If it does work such an estoppel, defendant may be concluded though the burden of proof and the rule concerning the requisite amount of proof are different when the contest is

had under a special plea or under the general issue; and though defendant may well have been prejudiced on the trial of his traverse in the special plea by his admitting at that time all elements of the offense except the particular fact traversed, as would not be the case under the general issue. Further, if there be an estoppel against defendant upon the fact which the jury finds against him under his traverse by special plea there will often be much difficulty in ascertaining just the scope of that estoppel and the consequent range of its effect on the later trial under the general issue. *If, on the other hand, the jury's verdict on the special plea does not estop defendant upon any point on the later trial of the general issue, then the result of allowing defendant to traverse by special plea any part of the merits and later to interpose a plea of not guilty will be to allow to defendant two trials on the same question of fact concerning the commission of the offense.*

The force of these considerations is made clear by the fact that, even if the special plea of the statute of limitations is treated as traversing only the date on which the offense was committed, it is quite impossible to prove when an offense is committed without proving the actual occurrence of all the facts essential to constitute the offense. Concretely, if a defendant alleges that he did not steal or conspire between January 1, 1907, and January 1, 1910, how can that assertion of defendant be negatived without showing fully the actual occurrence of the theft or

the conspiracy? The trial of a question when an offense occurred must always involve full proof of the existence of the offense.

Another reason which seems to show that a verdict against defendant on a traverse of any part of the merits by special plea of the statute of limitations can not estop defendant at all on a later trial under a plea of not guilty is that a verdict never works an estoppel unless it is supplemented by judgment determining what the verdict embraces. (Bigelow on Estoppel, 5th ed., p. 51.) If, however, defendant is permitted to interpose a plea of not guilty after verdict against him on a traverse in a special plea, the judgment on the plea (if, instead of the court's allowing defendant to withdraw his special plea, there be a judgment on the plea at all) will not determine anything on the verdict, because it will expressly allow defendant by pleading not guilty to traverse and dispute everything which he might have disputed by interposing the plea of not guilty at the outset. It is submitted that this consideration should be decisive against allowance of a traverse by special plea of any allegation of the indictment concerning commission of the offense.

3. It is involved in the very nature of any special plea in bar that it admits everything that the indictment alleges in reference to commission of the offense. It does not dispute the indictment, but shows that defendant ought not to be required to respond to it at all.

Chitty says:

> We come now to the consideration of special pleas in bar, which, *without entering into the facts of the offense,* show that the defendant *ought not at all to be called upon to answer the indictment.* (1 Chitty's Criminal Law, 5th Am. Ed., 451.)

Bishop says, with specific reference to a plea of the statute of limitations:

> *As this plea does not deny the original guilt charged,* defendants are permitted to plead it; though they need not, for they may avail themselves of the defense under the general issue. (Bishop's Directions and Forms, 2d Ed., sec. 1046; note on p. 598.)

Further, it has been held several times that even in a civil case a plea of the statute of limitations in defense of plaintiff's cause of action, "if any such there be," is bad.

> 1 Chitty's Pleading (16th Am. Ed., 1876), star p. 551.
>
> *Margetts* v. *Bays,* 4 Ad. and El., 489.
>
> *Marchant* v. *Valley Falls Baptist Church,* 6 R. I., 24.
>
> *Conger* v. *Johnston,* 2 Den., 96.

Other cases, while holding the form of plea last described good, place their decision on the ground that such words—"if any such there be"—are not a traverse and the plea admits the merits.

> *Fish* v. *Farwell,* 160 Illinois, 236, 241.
>
> *Bartalott* v. *International Bank,* 14 Ill., App., 158, 162.

4. The Criminal Appeals Act itself seems to recognize—or at any rate it furnishes a cogent, if not decisive, reason for holding—that a plea of the statute of limitations (or any other special plea in bar) can not traverse the indictment. Is any special plea to be permitted to traverse anything concerning the merits, with the result that the Government may have an appeal after a verdict on that traverse in favor of defendant (because the statute allows an appeal by the Government from *any* judgment sustaining a special plea in bar), though the Government still can not appeal from a final judgment rendered after a trial under a plea of not guilty and based on a verdict in defendant's favor upon the very point of fact (showing the prosecution barred by time) which was embraced in the traverse in the supposed former case? Is use of a plea of the statute of limitations as a traverse to be allowed, with such different results as to the Government's right of appeal according as the traverse is made by special plea or by general issue? Indeed, would not that use of the plea perhaps create a situation in which the Criminal Appeals Act would be in part unconstitutional?

5. It is beyond dispute that a defendant will suffer no harm from being forbidden to traverse any part of the merits of the indictment by a special plea of the statute of limitations; for he may make the same traverse and assert the statute of limitations under a plea of not guilty. The only possible reason that can be urged for allowing a special plea of the statute of limitations at all is that a demurrer on the ground

of the statute will not lie, though the indictment itself shows the offense to have been committed too long before the indictment was found (*United States* v. *Cook*, 17 Wall., 168), and therefore it may be sometimes convenient to permit use of a special plea of the statute with the function of a demurrer, inasmuch as the objection to the use of a demurrer (which is that the State can not then show facts bringing defendant within exceptions to the statute of limitations, e. g., that defendant has been a fugitive from justice) can be met in case of a special plea by a replication alleging the exceptions. Why should a special plea be allowed a larger function than this single practical advantage to be derived from the plea requires? As already shown, any wider function for the plea will make trouble instead of doing good.

6. It remains to say only that the use of a special plea of the statute of limitations in civil cases furnishes no analogy for a criminal case; because in a civil case the plea's use is necessary to avoid a waiver of the statute (while that is not true in a criminal case), and also because in a civil case the plea may be interposed and tried simultaneously with the general issue, so that the difficulties above indicated through use of the plea as a traverse in a criminal case will not arise.

THIRD.

As a result of the first point, defendant's plea of the statute of limitations must either be held bad for usurping the office of the general issue, however

the plea be construed; or it must be held bad for amounting in effect to the general issue and also for duplicity, unless the plea is construed as consistent with all the allegations of the indictment.

In discussing whether the prosecution is barred by time, the plea will therefore be taken as admitting the indictment's averments; because otherwise the plea can not be considered at all. This course is also justified by the fact that the Circuit Court treated the plea as in effect a demurrer.

1. If a special plea of the statute of limitations is not allowable in any case, then this plea attempts what only a plea of not guilty can do. It therefore amounts in effect to the general issue.

2. If, on the other hand, a special plea of the statute of limitations may be employed, in case it does not traverse anything charged in the indictment concerning commission of the offense, then the plea in this case is bad for amounting in effect to the general issue, unless it be treated as consistent with the indictment. If the plea be taken as traversing any material allegation of the indictment, it likewise is bad for duplicity; because then it joins in a single plea the two defenses of the statute of limitations and a denial of the merits.

Union of both matter in confession and avoidance and a traverse in the same plea is duplicitous. (Stephen on Pleading, 9th Am. Ed., by Heard, 258.)

3. Beside the necessity of treating the plea as consistent with the indictment, in order to save it at all, it would be unjust for this court now to treat it as a traverse when the Circuit Court treated it as a de-

murrer. The action of the Government in not asking leave of the Circuit Court to plead over, after the Circuit Court held the plea good, was induced naturally and quite inevitably by the Circuit Court's treating the plea as admitting all parts of the indictment and then holding the indictment itself insufficient. Nothing could have been gained by pleading over in this situation. Indeed, if the Circuit Court was right in its treatment of the plea as practically a demurrer, it would have been improper to plead over.

FOURTH.

Upon its own allegations the indictment shows the offense charged against defendants to have been committed within three years before the indictment was found.

This proposition will be supported by these two separate contentions, of which either will suffice of itself to show that the prosecution is not barred:

I. The indictment charges a conspiracy which, though formed in 1903 and then at once followed by overt acts, *continued* as an existing agreement or confederacy up to the filing of the indictment on July 1, 1909. No additional overt act by anybody within three years before the finding of the indictment was necessary to make the still existing conspiracy agreement or combination an indictable offense.

II. If an overt act within three years before the finding of the indictment was necessary, many such acts are charged in the indictment.

In support of these propositions—

I.

The indictment charges a conspiracy which, though formed in 1903 and then at once followed by overt acts, *continued* as an existing agreement or confederacy up to the filing of the indictment on July 1, 1909. No additional overt act by anybody within three years before the finding of the indictment was necessary to make the still existing conspiracy agreement or combination an indictable offense.

1. It is unmistakable that the indictment in fact charges against all defendants the actual existence of a conspiracy agreement or confederation between defendants within three years before the indictment was found. It charges the existence of such an agreement or confederation continuously and at all times between its inception in 1903 and the finding of the indictment; and it also charges explicitly that the conspiracy had a continuing object, viz, not merely to put the Pennsylvania Company momentarily out of business and out of competition with the American Company, but to keep it out of business and competition permanently or at any rate as long as possible.

Thus, it is averred that "on said thirtieth day of December, in the year nineteen hundred and three and *continuously and at all times during said period of six years*, to wit, from that day until and on the day of the finding and presentation of this indictment," defendants "*have engaged in an unlawful and corrupt conspiracy* among themselves in restraint of

said trade and commerce in refined sugar among the several States of the United States; that is to say, a conspiracy unreasonably to restrain and eliminate free competition and prevent all competition" with the American Company. (Rec., 5.)

It is also directly alleged that defendants "*throughout the period of three years* next preceding the finding and presentation of this indictment, in manner and form aforesaid, unlawfully *have engaged in a conspiracy* in restraint of trade and commerce in refined sugar among the several States." (Rec., 18.) The averments just quoted directly state the existence of the conspiracy agreement or confederation as a fact.

The purpose entertained by the conspirators is averred to be that the Pennsylvania Company should be *kept* out of competition with the American Company permanently or as long as possible. Thus, it is stated that "when the power of control over and management of said Pennsylvania Sugar Refining Company should be so acquired by said corporation defendant for the term of one year in the manner aforesaid, said corporation and individual defendants were to use every means in their power *to extend said term and said power of control*, particularly by keeping said Adolph Segal involved in debt and his affairs in such a condition as to prevent his relieving himself from his obligations to said corporation defendant, and by wrongfully and arbitrarily refusing to accept payment of such obligations from him either before or at their maturity, or to surrender to him

such power of control over and management of said Pennsylvania Sugar Refining Company." (Rec. 6.) This is a charge that the conscious object of the conspiracy was to continue the subjection of the Pennsylvania Company to the American Company as long as possible. It is further alleged that defendants were to use their power of control over the Pennsylvania Company "to prevent said Pennsylvania Sugar Refining Company from engaging in or carrying on, in whole or in part, the business, trade, and commerce which it was organized for carrying on, and had so prepared to carry on, and so intended to carry on, as aforesaid; and *were thereby to bring about the ruin* of said Pennsylvania Sugar Refining Company through inaction, and the destruction of its said property and facilities through decay, and *eliminate and entirely prevent* the competition" with the American Company which otherwise would exist. (Rec. 6.) This means, of course, that defendants intended and mutually understood that they would keep the Pennsylvania Company out of business and competition as long as possible; and the words "eliminate and entirely prevent" its competition mean that it was proposed to keep the Pennsylvania Company out of competition permanently.

Indeed, any purpose on the part of the conspirators to keep the Pennsylvania Company out of business and competition merely for a moment, and not continuously, would be absurd. It would accomplish none of the objects which are charged to have been sought.

Likewise, the means charged to have been used by the conspirators manifest a continuous purpose of keeping the Pennsylvania Company inactive permanently or as long as possible. For illustration, the proxy given Kissel to vote a majority of the stock of the Pennsylvania Company was irrevocable. (Rec., 10.) The original agreement between Segal and Kissel provided that "as the control thereby given is a material part of the consideration for the said note, the borrower further agrees that he will so arrange that, of the seven directors of the said Pennsylvania Sugar Refining Company, four to be nominated by the lenders, of whom one shall be the said Gustav E. Kissel, shall be put in place of four of the present directors; that they, or substitutes to be nominated by the lenders, shall be directors so long as any part of the loan shall remain unpaid; that the control and possession of the property of the said the Pennsylvania Sugar Refining Company shall be in such way and so effectually subjected to the control of the board of directors that so long as the note, or any part thereof, remains unpaid, the refinery of the said the Pennsylvania Sugar Refining Company shall only be run or operated or do business as shall be directed by such board of directors." (Rec., 9.) The directors of the Pennsylvania Company, chosen in the interest of the American Company, left their order of December 30, 1903, that the Pennsylvania Company "should thereafter refrain from carrying on its business until the further order of said board of directors," continuously unrevoked

and effective. (Rec., 10, 11.) By this means they pursued their purpose of keeping the Pennsylvania Company from "earning profits and paying dividends to its stockholders in such a way as to enable said Adolph Segal to pay such interest and repay such principal sum so to be borrowed; it being a fact, as the grand jurors aforesaid, upon their oath aforesaid, charge it to be, that, as said corporation and individual defendants then well knew, said Adolph Segal would be dependent upon such dividends for moneys with which to pay such interest and repay such borrowed sum and, in the event of said Pennsylvania Sugar Refining Company's failure to carry on its said business, trade, and commerce and pay such dividends, his financial affairs would be put in a ruinous condition, and the hold of said corporation defendant upon him and upon said Pennsylvania Sugar Refining Company, by reason of such his obligations to said corporation defendant, continued and greatly strengthened." (Rec., 6.)

In view of the direct allegation of a continuously existing agreement or confederacy between the conspirators, and of the repeatedly alleged purpose of the conspiracy to keep the Pennsylvania Company out of business as long as possible, and of the character of the methods alleged to have been taken in pursuit of that purpose, it is impossible to dispute that the indictment charges as a fact the existence of the conspiracy agreement within three years before the indictment was found.

2. As the conspiracy agreement is charged to have actually existed up to the time of indictment and as any influence that section 5440 of the Revised Statutes may have upon the case is satisfied by the removal of any *locus pœnitentiæ* through the occurrence of overt acts at once after the conspiracy was formed, it is altogether immaterial whether or not any overt act was done by any conspirator within three years before the indictment was found. This is the most fundamental point on the merits of the case because it reaches to the bottom of the legal theory of conspiracy, and, while this indictment charges that overt acts for which defendants Kissel and Harned are responsible occurred within three years before the indictment was found, the court will not need to go to that branch of the case if the present point is sound.

I shall first treat the point with reference to conspiracies of various kinds under section 5440 of the Revised Statutes, as that will better introduce the pertinent general principles and the existing Federal cases commonly relate to that statute; and then the Sherman Act, on which this indictment is based, will be directly considered.

A. Concerning conspiracies generally.

(1) At common law the existence of the conspiracy agreement or confederation constituted the crime, without even a single overt act in pursuance of it.

Rex v. *Gill and Henry*, 2 B. & Ald., 204.

Bannon and Mulkey v. *United States*, 156 U. S., 464, 468, 469.

Wright's Criminal Conspiracies (Carson's Am. Ed., 1887), 124.

The gist of the offense is therefore the fact of confederating, as said by Chief Justice Savage in *People* v. *Fisher* (14 Wendell, 9). Section 5440 has not altered the nature of the offense or the rules relating to it, save in one particular, viz, that the conspiracy may not now be prosecuted until one overt act has been committed; because section 5440 gives a *locus pœnitentiae* until the commission of one overt act. After the commission of a single overt act, the law of conspiracy is unaffected by section 5440.

United States v. *Britton*, 108 U. S., 199.

Pettibone v. *United States*, 148 U. S., 197, 202.

Dealy v. *United States*, 152 U. S., 539, 543.

Bannon v. *United States*, 156 U. S., 464, 469.

Hyde v. *Shine*, 199 U. S., 62, 76.

Williamson v. *United States*, 207 U. S., 425, 447.

If, then, a conspiracy is indictable at common law before any overt act, it must have been likewise indictable at common law at any time after the commission of an overt act if the conspiracy agreement or confederation still actually existed. As section 5440 leaves the conspiracy agreement or confederation still the gist of the offense, it must be still an offense so long as that agreement or confederation in fact exists, whether or not it is supplemented by more than one overt act.

(2) The only question, therefore, concerning the operation of the statute of limitations is whether the conspiracy agreement or the confederation continued actually to exist within three years before the indictment. That question is answered by the actual averments of this indictment, as already shown; for *the question whether and how long the mutual understanding and purpose of the conspirators continues is one of fact.*

(3) A conspiracy agreement, at least if it be a conspiracy to accomplish an unlawful object, is in its very nature a continuing arrangement between the conspirators, the duration of the agreement or confederation depending upon the nature of the object which they propose to accomplish. Any conspirator, of course, by affirmative action may at any time withdraw from the conspiracy; but, in the absence of withdrawal, the conspirators contemplate continued action for a longer or shorter time, according to their ultimate object. So long as their understanding or agreement contemplates further action, if necessary to attainment of the ultimate object of the conspiracy, the agreement or confederation still exists, and the mere fact that during a certain time no action is found necessary or is taken does not terminate the existence of the mutual understanding and purpose if the object of the conspiracy has not yet been fully achieved.

Suppose the greatest of all conspiracies—to subvert the Government itself. The confederation for that purpose must be deemed to exist, in the absence of affirmative abandonment, until the object is at-

tained, or at any rate so long as the conspirators actually still contemplate action under it; and the conspiracy does not cease to exist from the mere fact that for a time the conspirators remain inactive. If abandonment of the conspiracy may be inferred sometimes from mere inaction, that can only be after the inaction has continued so long and under such circumstances that it may be inferred that the conspirators no longer contemplate any action in pursuit of their original purpose; and the extent of the time during which inaction must continue in order to evidence abandonment depends of course upon the terms of the conspiracy agreement and the object proposed to be accomplished. If conspirators expressly understand among themselves that they will pursue their object for six months, a year, or five years, no abandonment can be inferred from inaction for a shorter time than the understanding has expressly named for its own continuance. If, on the other hand, the conspiracy understanding does not definitely fix the time of its endurance, then the object of the conspiracy becomes all-important on the question how long the conspirators contemplated common action to a common end. As already shown, the object of the conspiracy in this case was, as the indictment alleges and as the very nature of the project discloses, not to suppress the competition of the Pennsylvania Company for a day or for a month or for a year, but to keep the Pennsylvania Company out of competition with the American Company as long as possible. The conspiracy having that continuing object,

the conspirators must be taken (in the absence of proof of affirmative withdrawal) to have contemplated continuous action as might be necessary from time to time for accomplishment of the continued suppression of the Pennsylvania Company's competition; and abandonment of their conspiracy agreement and purpose can not be inferred from mere inaction for even a substantial period.

Indeed, *abandonment* of a conspiracy, through inaction or otherwise, *is a question of fact;* just as is the original formation of the conspiracy. That fact is for the jury unless, in view of the alleged or proved nature and purpose of the conspiracy, inaction of the conspirators under it has endured so long that the court can say that a jury could not reasonably conclude that the inaction did not evidence abandonment. Any possibility of the court's deciding for itself that three years' inaction compels the legal conclusion that the conspiracy charged in this indictment had been abandoned is removed by the continuous purpose which the indictment charges the conspirators with entertaining in common. Beyond that, it is to be remembered again that this indictment charges continuance of the conspiracy agreement or confederation up to the time of indictment, and that negatives as a matter of fact any claim of abandonment until the allegations of the indictment are disproved by evidence.

(4) It is impossible to erect any rule that every conspiracy, without reference to its nature and object, must be deemed abandoned after three years of

inaction, through analogy of the statute of limitations. In the first place, the statute of limitations itself does not deal with the question how long any offense continues, but simply says that prosecution shall not be had more than three years after the offense has ceased to continue. The question when and how long any offense continues is quite independent of the statute of limitations. In the second place, an invariable rule for inferring abandonment of any conspiracy after three years of inaction disregards wholly the differences between conspiracies of different kind and purpose. If a conspiracy contemplating an immediate outcome may be deemed abandoned after three years of inaction, though its purpose was not attained, how can any such rule be applied to a conspiracy which contemplates a purpose to be attained long after inception of the conspiracy, or which contemplates a purpose of maintaining a situation, as in this case, indefinitely? Further, how can a conspiracy be deemed abandoned after three years of inaction if by its explicit terms the conspirators contemplate continuous action for a long period, or perhaps contemplate directly a long suspension of their activities in the course of their plan? An unvarying rule concerning the effect of inaction is utterly incompatible with the infinite variety of possible conspiracies, as to both their plan and their purpose. In the third place, and conclusively, if from a false analogy of the statute of limitations three years of inaction are to be taken as legally evidencing the abandonment of a conspiracy, it is certainly true

that such abandonment can not be inferred to have occurred at the beginning of the three-year period, but must rather be deemed to have happened at the end of the three years; with the result that the statute of limitations would begin to run from the end of the three-year period of inaction, not from its beginning. This shows also that, if the statute of limitations is used once for determining when a conspiracy has been abandoned, it must be used again for determining a later date beyond which the conspiracy may not be prosecuted; with the result of giving the statute of limitations double and fundamentally different operation.

(5) The fact that a conspiracy agreement or confederation may, and with rare if any exceptions does, continue in existence independently of the commission of any overt act under it is proved by the fundamental rule that each conspirator continues responsible for the acts of all in pursuit of the purpose of the conspiracy, without new reassertion or reestablishment of the conspiracy agreement. This mutual responsibility for the acts of any conspirator rests upon and grows out of the continuing agreement or confederation. Otherwise it can have no basis whatever, and is radically wrong. Whence does the mutual agency of the conspirators come, if not from the continuing consent of each conspirator to the acts of all; and whence does that continuing consent come, if not from the continued existence of the conspiracy agreement? This aspect of the matter ought to be decisive.

(6) Even when the single overt act required by section 5440 before prosecution occurs outside of the jurisdiction of the court where the indictment is found, prosecution in that court is proper if the conspiracy agreement was there formed or has there existed. (*Dealy* v. *United States*, 152 U. S., 539.)

This shows that even the first overt act is not of the gist of the offense. *A fortiori*, subsequent overt acts are not.

And why is prosecution also possible within the jurisdiction where any overt act is done? Not because that overt act is itself the offense or because it is even a part of the offense, but because the conspiracy agreement is deemed to exist wherever, with the consent of the conspirators, action is taken under it.

(7) It is sometimes said in the books that each overt act "renews" the conspiracy. That is true only in the sense that the overt act constitutes renewed or further evidence of the continued existence of the conspiracy. The statement is not true if it means that each new overt act creates a new conspiracy; for there can be no such thing as an overt act in pursuance of a conspiracy without a precedently existing conspiracy. A so-called overt act can not itself create a conspiracy. It may be a wrong act in itself, but it will not support a charge of conspiracy unless it follows an actual conspiracy agreement or confederation. The act can not even be charged to any person but the individual who does it, unless his agency for others in doing it has been created by a

previous mutual understanding. Further, if each overt act makes a new and separate conspiracy—instead of all overt acts being referred to a single continuous conspiracy contemplating the object in pursuit of which the overt acts are done—then there may be as many prosecutions as there are overt acts, instead of a single prosecution for the continuing confederation by reason of which the acts are done.

What more can be necessary in support of the propositions that a conspiracy agreement or confederation may, and commonly does, continue in actual existence for substantial and varying periods after the last overt act that happens yet to have been done under it; that its actual continuance is a question of fact; that this indictment charges continued actual existence of the conspiracy up to the time of indictment; and that no legal inference of abandonment of the conspiracy can be made by the court in disregard of the express allegation of the indictment that it did continue until the indictment was found, and in further disregard of the alleged and plain object of the conspiracy—to keep the Pennsylvania Company indefinitely out of competition with the American Company—and in further disregard of the complete irrelevance of the statute of limitations to the question whether a conspiracy agreement has actually been abandoned through inaction for a time, and in further disregard of the obvious impropriety of holding that conspiracies of all kinds, whatever their terms and their purpose and their plan of action, must be held uniformly terminated (in spite even of express

agreement of the conspirators to the contrary) by three years of inaction?

There is no Federal authority that an overt act must occur within three years of the indictment, though the conspiracy agreement continues through those three years; unless that view is implied in the holding by two district judges that the statute of limitations runs from the first overt act, though there be later overt acts within three years. In this court the application of the statute of limitations to conspiracies seems never to have been considered in any aspect. The cases in the lower Federal courts may be conveniently grouped as follows:

(*a*) Practically all the cases hold that prosecution is not barred if an overt act has occurred within three years.

United States v. *Raley*, 173 Fed., 159; 165, 166.

United States v. *Breese*, 173 Fed., 402, 411.

Jones v. *United States*, 162 Fed., 417; 425–427.

United States v. *Lonabaugh*, 158 Fed., 314, 319.

United States v. *Barber*, 157 Fed., 889.

United States v. *Bradford*, 152 Fed., 616, 617.

United States v. *Brace*, 149 Fed., 874.

United States v. *Bradford*, 148 Fed., 413.

United States v. *Greene*, 115 Fed., 343, 355.

Lorenz v. *United States*, 24 App. D. C., 337; 387, 388.

To like effect:

Insurance Companies v. *State*, 75 Miss., 24; 35–38.

Ochs v. *People*, 124 Ill., 399, 429.
People v. *Willis*, 23 Misc. (N. Y.), 568, 573.

The foregoing Federal cases do not hold that an overt act within three years is necessary, if the conspiracy still continues; but they hold only that the coexistence of the conspiracy and an overt act within three years is sufficient. The cases did not involve the question now under discussion, for in each case an overt act had been done within three years. The attention of the court was directed in all these cases to the single question whether the statute runs from the first overt act, and that question was answered in the negative.

(*b*) The case of *Ware* v. *United States* (154 Fed., 577), decided the identical thing held in the many cases above cited. I mention it separately because Judge Sanborn there stated that the conspiracy and the overt act must coexist within three years; but so far as this statement indicates that an overt act must happen within three years, it was pure *dictum*. The court held that an overt act had occurred within three years, and consequently the court neither did nor could decide that a conspiracy still existing within three years could not be prosecuted if an overt act had not been done within three years.

On principle, too, the statement of Judge Sanborn is wrong. The considerations already presented suffice to show the error. A single concrete illustration may be made: Suppose that a conspiracy is formed January 1, 1905, which by the express agreement of the conspirators is to last for four years, or

which by the express agreement of the conspirators contemplates action for a few days at once and then again in the fourth year after an interval of inaction. Suppose, further, that a single overt act is done January 2, 1905, so as to satisfy section 5440. Is the conspiracy beyond prosecution after January 2, 1908, before overt acts are again done under it?

(*c*) In the case of *United States* v. *Black* (160 Fed., 431) the decision was that the statute of limitations is a bar when the conspiracy ended, by attainment of its purpose, more than three years before indictment and (as necessarily followed) without an overt act done within the three years. This is of course correct, because the conspiracy agreement itself had ended.

(*d*) We have left two decisions by district judges Deady and Quarles that the statute runs from the first overt act, though there be other overt acts within three years.

United States v. *Owen*, 32 Fed., 534.
Ex parte Black, 147 Fed., 832.

These cases are obviously wrong; are opposed to the great number of cases above cited; the *Owen* case was overruled by the Court of Appeals for the Ninth Circuit in *Jones* v. *United States* (162 Fed., 417); and the Court of Appeals for the Seventh Circuit decided the *Black* case, as already stated (160 Fed., 431), on other grounds than Judge Quarles took.

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The case of *United States* v. *McCord* (72 Fed., 159), reporting a charge by District Judge Bunn to a jury, was cited by Judge Quarles in the *Black* case as the basis of his own holding, but is not pertinent because there was no proof of an overt act within three years (p. 162).

This review of the cases will show that not only is the point now urged still open, viz, that an overt act within three years is not necessary if the conspiracy agreement then still continues, but the tendency of the lower Federal cases is toward the right rule.

The case of *United States* v. *Irvine* (98 U. S., 450), upon which the circuit court relied in this case, has no pertinence whatsoever. It was there held that the offense of "withholding" pension money is not a continuous offense, but is complete as soon as demand for the money is wrongfully refused. That is far from a conspiracy case. A conspiracy agreement continues because it contemplates and is intended by the conspirators to produce wrongful action in the future. The full and real injury from it does not happen until the conspiracy's object is attained. The wrongful withholding of pension money works the full injury at once; and it has no tendency or purpose, like a conspiracy, to induce subsequent wrong or injury.

The Pennsylvania case of *Commonwealth* v. *Bartilson* (85 Pa. St., 482) holds two things: (1) That a count of an indictment alleging that a conspiracy has been renewed by an overt act done under it alleges a new, separate conspiracy, and that therefore the count is duplicitous, and (2) that a count which al-

leges existence of the conspiracy at the time of the overt act, but not a renewal of the original conspiracy, is good when both conspiracy and overt act exist within the limitation period. The former of these holdings seems an absurd piece of verbalism, and the second holding does not bear upon the question whether an overt act within the limitation time is requisite, if the conspiracy still exists.

B. Concerning conspiracies to restrain interstate commerce under the Sherman Act (26 Stat., c. 647, p. 209)—

Only two things need here be added to the treatment of conspiracies generally.

(1) The Sherman Act makes a conspiracy in restraint of commerce or to monopolize commerce an offense without the occurrence of even a single overt act.

(*a*) Section 5440 of the Revised Statutes is inapplicable. The condemnation of conspiracy as a crime by the Sherman Act is a special case, outside of and different from section 5440. The punishment under the two laws is different; being less under the Sherman Act. If Congress had meant that an overt act should be necessary before prosecution for a conspiracy to restrain commerce, it had before it the example of the express requirement of an overt act under section 5440 and would have repeated that requirement in the Sherman Act.

(*b*) The terms of the Sherman Act must be construed in the light of the common law. "Conspiracy" in that act must be what it was at common law, as

respects its elements. As already seen, no overt act was necessary to a prosecution for conspiracy at common law; and this common-law rule obtains concerning prosecutions for conspiracy under the Sherman Act.

(*c*) The words "in restraint of trade" in the statute mean "for the purpose of restraining trade." The very phrase is taken from the common law, which grouped a certain class of contracts under the well-known name of "contracts in restraint of trade." That name covered contracts whose purpose was to restrain trade, whether or not they had yet actually so resulted. A contract is in restraint of trade from its initial execution, if ever. Further, it is inconceivable that Congress meant a contract or conspiracy in restraint of trade to go unpunished until it had been allowed to succeed so far as actually to restrain trade. Still further, the second section of the Sherman Act punishes not only established monopolies, but any "attempt to monopolize" and any conspiracy "to monopolize," whether monopoly has yet resulted or not.

(2) The fact that conspiracies generally may be and usually are continuing agreements or understandings, as already shown, is emphatically true of conspiracies to restrain or to monopolize commerce. In such cases not only may the conspiracy endure, as in the case of conspiracies generally, until a single complete result is effected, but the result intended by the conspirators is itself, quite inevitably, a continuing condition of things. Restraint or monopolization

of commerce for a moment or a day is not the object of a conspiracy to restrain or monopolize it; the conspirators seek continuous restraint and monopolization. This indictment charges that defendants sought such continuing result.

Certain decisions of this court illustrate the continuity of offenses under the Sherman Act. In *United States* v. *Trans-Missouri Freight Association* (166 U. S., 290) the contract forming the defendant association had been made before the Sherman Act was passed, but a continuance of the association after enactment of the statute was held to be within the statutory prohibition. Mr. Justice Peckham said:

> It is said that to grant the injunction prayed for in this case is to give the statute a retroactive effect; that the contract at the time it was entered into was not prohibited or declared illegal by the statute, as it had not then been passed; and to now enjoin the doing of an act which was legal at the time it was done would be improper. We give to the law no retroactive effect. The agreement in question is a continuing one. The parties to it adopt certain machinery, and agree to certain method for the purpose of establishing and maintaining in the future reasonable rates for transportation. Assuming such action to have been legal at the time the agreement was first entered into, the continuation of the agreement, after it has been declared to be illegal, becomes a violation of the act. The statute prohibits the continuing or entering into such an agreement for the future, and if the agree-

> ment be continued it then becomes a violation of the act. There is nothing of an *ex post facto* character about the act. The civil remedy by injunction and the liability to punishment under the criminal provisions of the act are entirely distinct, and there can be no question of any act being regarded as a violation of the statute which occurred before it was passed. After its passage, if the law be violated, the parties violating it may render themselves liable to be punished criminally; but not otherwise (p. 342).

In *Northern Securities Company* v. *United States* (193 U. S., 197) the court restrained continuance of a combination already formed. This must have been because such continuance of the combination was condemned by the act as much as its formation.

In *Loewe* v. *Lawlor* (208 U. S., 274) damages were awarded for losses caused by continuance of a conspiracy in restraint of trade, because the conspiracy was a continuing wrong.

Judge Hough, in the Circuit Court, overruled a demurrer to an indictment for violating sections 1 and 2 of the Sherman Act, which claimed that the indictment was bad for duplicity and indefiniteness, and he said:

> It is true that the gist of the alleged offenses is the combination or the attempt at monopoly, but it is not true that the offenses are complete when the combination is mentally formed or the mental intention to monopolize arises. The statutory offense, and the one charged herein, does not depend upon "a

single agreement, but [on] a course of conduct intended to be continued;" yet, nevertheless, "the thing done and intended to be done is perfectly definite." (*Swift* v. *United States*, 196 U. S., p. 400; 25 Sup. Ct. 281, 49 L. Ed., 518.) That case arose on the civil side of the court, but it is to be remembered that the same facts and acts which expose violators of this statute to civil suit also render them subject to indictment. In this case, while the time is indefinite, the thing done is definite, and that is all that the statute requires.

To show that an exact time may be, and therefore must be, assigned for the commission of the offense of combination, the defendants argue upon the meaning of the word "engage" as used in the statute, and strenuously urge that since the offense prohibited is that of "engaging in" a combination, it must be complete as soon as the accused employs his attention or effort in or about the same, that such employment of attention or effort is capable of precise assignment in point of time, and they challenge the prosecution to name the day.

The statute is not directed against such an abstraction as this. It does not require on the part of the prosecution clairvoyance to discover or locate the offense. Its prohibition is not directed against a state of mind, but against a state of facts. The facts do not simultaneously occur; the events are not contemporaneous. It may, and naturally would, require time for the working parts of the combination to become cooperative, or

> for the monopoly to become more than a hope; and what is forbidden and renders the actors obnoxious to the criminal law is not an undiscoverable thought or hope, but a perfectly obvious result or condition. The condition or state of facts against which the statute is directed is a continuing condition, and therefore the offense of creating and maintaining that condition is necessarily a continuing offense, and does not, from its very nature, require greater particularity in assignment than is used in this indictment. (*United States* v. *MacAndrews & Forbes Company*, 149 Fed., 823, 830.)

II.

If an overt act within three years before the finding of the indictment was necessary, many such acts are charged in the indictment.

A. The overt acts alleged to have been done within three years by others than Kissel and Harned themselves will first be considered. As the conspiracy is alleged to have existed on the part of all defendants up to the very time of the indictment, it of course results that any overt act done by any one of the conspirators within three years of the indictment is chargable to all the conspirators.

1. The overt acts charged to have been done by others than Kissel and Harned within three years are:

(*a*) On February 13, 1907, four of the defendants, directors of the American Company, attended a meeting of the directors of that company and each voted

for "and thereby secured the adoption of" resolutions agreeing to assume "the entire responsibility of" and to defend, protect, and "indemnify" both President Havemeyer of the American Company and Mr. Parsons, its counsel and a defendant herein, against all consequences of "what has occurred in the Segal matter," and further agreeing that in the event of a suit and possible recovery the company would pay what was recovered and, in case of appeal, procure a stay. (Rec., 15, 16.)

(*b*) On February 15, 1907, defendant Parsons wrote the American Company agreeing that he would "both on the company's account and on my own cooperate in defending any proceeding which may be taken by Mr. Earle," who was receiver of the Pennsylvania Company. (Rec., 16.)

(*c*) On May 3, 1907, the American Company paid defendant Kissel for certain of his expenses incurred in connection with his action under the conspiracy. (Rec., 17.)

(*d*) On November 12, 1907, five of the defendants attended a meeting of the directors of the American Company; it not being alleged what particular action was taken by them at that time. (Rec., 18.)

(*e*) On April 19, 1909, defendant Parsons advised the American Company not "to submit the bonds" of the Pennsylvania Company "held by Mr. Kissel * * * to the action of a probably hostile committee," referring, of course, to some committee concerning rearrangement of the financial affairs of the Pennsylvania Company. (Rec., 18.)

2. Each of these acts is expressly charged in the indictment to have been done "in pursuance of said unlawful and corrupt conspiracy and to effect the object of the same." (Rec., 15, 16, 17, 18.)

This allegation will suffice to show—until it is disproved on a trial—that the act was in fact done to effect the object of the conspiracy, unless such act is legally incapable of so operating; and the act can not be said as a matter of law to have been incapable of being an overt act in pursuance of the conspiracy and to effect its object if the act *might* in *any* circumstances actually tend to effect the object of the conspiracy.

3. Not only might each of the foregoing five overt acts tend under some circumstances to effect the object of the conspiracy, but it is even probable in advance of evidence that they did tend actually to effect the object of the conspiracy under the circumstances which the indictment itself discloses.

(*a*) The American Company's agreement with Havemeyer and Parsons to assume all responsibility for "the Segal matter" and to protect them against its consequences would naturally operate to induce Parsons, alleged in the indictment to have been at all times a participant in the conspiracy, to continue in the courses of the conspiracy, instead of withdrawing from the conspiracy, or at any rate offering less strenuous and effective resistance to the suits and other efforts of those interested in the Pennsylvania Company. Such retention of Parsons in the conspiracy may have been the very purpose of the

promised protection; and, whether so intended or not, it would naturally operate that way. It is to be remembered also here that the full purpose of the conspiracy in keeping the Pennsylvania Company indefinitely out of business and competition had not yet been attained. More was still to be done.

It is of some significance, too, that this action of the American Company toward Havemeyer and Parsons was quite in accord with similar action whereby on January 5, 1904, the American Company agreed to hold defendant Kissel "harmless by reason of the execution of that agreement and of any action taken under it"—referring to the original agreement of December 30, 1903, which was the first great step in the conspiracy. (Rec., 15.) It can not be doubted that the purpose of this arrangement with Kissel was to induce his action in the conspiracy. Indeed, it expressly refers to "action taken under" the original Segal agreement. Why should the purpose of the promised protection to Parsons have been different?

(*b*) Parsons' letter of February 15, 1907, promising the American Company to defend any proceeding brought by the receiver of the Pennsylvania Company, was one direct response to the protection promised him two days before. This promise of Parsons, of course, as he must have intended to keep his promise, operated naturally to hold one of the conspirators in line.

(*c*) The American Company's payment on May 3, 1907, of the expenses previously incurred by Kissel

in connection with his action under the conspiracy may likewise have been designed to induce Kissel's continued fidelity to the plans of the conspiracy. Whether so actually intended or not it would naturally operate in that way. If payment had been refused to Kissel, would not that have tended to make Kissel discontinue his services to the conspiracy? For mere illustration of the importance of Kissel's continued adherence to the plans of the conspiracy let it be remembered that Kissel was holding the power of attorney to vote the stock of the American Company, by the use of which the American Company's continued choice of directors in the Pennsylvania Company and control of the latter company's action or inaction could be effected.

It may be true, as held in *United States* v. *Black* (160 Fed., 431) that payment after the object of a conspiracy has been fully attained of a conspirator's expenses in the course of accomplishing the conspiracy's object can not be an overt act; but that is because there is nothing further to be done and consequently there is no reason for inducing further action by the conspirator who receives the payment. In the present case the object of the conspiracy was still to be pursued after May 3, 1907, when the payment to Kissel was made.

(*d*) The participation of five defendants, who were directors of the American Company, in a meeting on November 12, 1907, may have tended to promote the conspiracy in any one of a hundred ways. What in particular was then done the indictment does not

allege; and therefore any possible supposition may be made as to action at that meeting in support of the plans of the conspiracy. If anything could then have been done to effect the object of the conspiracy, it must at present be deemed to have been done, because of the allegation of the indictment that defendants attended the meeting "in pursuance of said unlawful and corrupt conspiracy and to effect the object of the same." (Rec., 18.) For illustration, defendants at the meeting may then have directed or advised that Kissel be still employed to hold the power of attorney to vote the stock of the Pennsylvania Company, or that the stock still be voted in favor of directors who would act in the interest of the American Company, or that particular persons should be chosen to the directorship of the Pennsylvania Company, or that payment of Segal's debt, which was long overdue, be refused, and the American Company's retention of the Pennsylvania Company's stock and of the power to vote it be thereby continued. The conspirators, as will be recalled, were under the conspiracy agreement "to use every means in their power to extend said term" of Segal's debt remaining unpaid "and said power of control, particularly by keeping said Adolph Segal involved in debt and his affairs in such a condition as to prevent his relieving himself from his obligations to said corporation defendant, and by wrongfully and arbitrarily refusing to accept payment of such obligations from him." (Rec., 6.)

Further, at this meeting of November 12, 1907, the five conspirators present may have agreed, or incited either one of themselves or another, to any sort of action in aid of the conspiracy. They may then have determined, or issued instructions, that things be done which would prolong the bankruptcy of the American Company and the receivership established on October 2, 1906. (Rec., 33.)

(*e*) The advice given by defendant Parsons on April 19, 1909, to the American Company, that it do not "submit the bonds" of the Pennsylvania Company "held by Mr. Kissel * * * to the action of a probably hostile committee," may well have been, and probably was, calculated to retard any negotiations or arrangements for readjustment of the financial affairs of the Pennsylvania Company, with the result of shortening the time of its bankruptcy and receivership or with the result of discouraging action by stockholders or others interested in the Pennsylvania Company, and not in the American Company, for the purpose of paying off Segal's debt and so relieving the Pennsylvania Company from the thralldom of the American Company's continued power over its stock and directorship.

We thus have five acts done within three years before the indictment by the conspirators other than Kissel and Harned—each of which under the allegations of the indictment must be deemed a sufficient overt act.

B. If an overt act within three years must have been done by Kissel himself, the indictment shows three such overt acts on his part.

(*a*) Kissel continued to hold, at least until December 30, 1906, the power of attorney given him December 30, 1903, to vote the stock of the Pennsylvania Company. Thus, on January 4, 1904, he wrote the American Company that he then held this power of attorney. (Rec., 14.) Up to December 30, 1906, he certainly continued to hold the vault and continued to charge the American Company for the expense of the vault, in which he was keeping the power of attorney and the stocks and bonds of the Pennsylvania Company. (Item of December 8, 1906, in Kissel's bill of May 3, 1907; Rec., 17.) In his immunity plea Kissel shows that on or shortly after May 26, 1909, he still retained possession of the power of attorney, because on that date, in obedience to a subpœna, he produced it in court. (Rec. 36, 49.) Kissel's continued holding of this power of attorney, which was a chief foundation of the American Company's continued control over the management of the Pennsylvania Company, is an overt act of the first importance. It of course tended to effect the object of the conspiracy, because retention of the power of attorney by somebody was essential to its exercise. Further, its retention in the name and hands of some one else than the American Company was all important to the purpose of the conspiracy, for thereby secrecy was preserved as to the American

Company's being the real lender of the money advanced to Segal and being the real controller of the use of the power of attorney and of the stocks and bonds put in the hands of Kissel. Had the persons interested in the Pennsylvania Company known the American Company's relation to and control of the situation, and its real authorship of the order of its appointed directors of the Pennsylvania Company that the latter company "refrain from carrying on its business until the further order of said directors" (Rec., 10, 11), such knowledge would have tended in the strongest way to impel the persons interested in the Pennsylvania Company to raise funds to pay off Segal's debt and thereby destroy the power of attorney and the pledge of stock or to take legal action in attack upon the mismanagement of the Pennsylvania Company's affairs in the interest of the American Company by the directors which the latter had chosen. Kissel's continued holding of the power of attorney and the securities of the Pennsylvania Company was a means of keeping all interested in the Pennsylvania Company ignorant of the American Company's relation to the whole affair, and it therefore tended as strongly as anything could to guard the conspirators against financial or legal efforts on the part of those interested in the American Company to break up the American Company's control.

Indeed, the indictment expressly charges that it was the plan of the conspirators to have the power of attorney and stock given to Kissel as the agent

of an undisclosed principal, "without said Adolph Segal being aware of the fact that said corporation defendant would be the real lender of such sum of money to him, and without his suspecting the designs of said corporation and individual defendants in the premises, or having reason to suppose that such undisclosed lender would have any other desire but one to obtain interest upon and the repayment of such sum when due, or any motive for preventing the said Pennsylvania Sugar Refining Company from carrying on its said intended business, trade, and commerce, and thereby earning profits and paying dividends to its stockholders in such a way as to enable said Adolph Segal to pay such interest and repay such principal sum so to be borrowed." (Rec., 5, 6.)

(*b*) At least until December 30, 1906, Kissel continued to hold the stock and bonds of the Pennsylvania Company, beside the power of attorney; and this stock was a majority of all the stock of the Pennsylvania Company. The proof that Kissel continued to hold the power of attorney at least until December 30, 1906, applies also to the stock and bonds; and defendant Parsons stated in his letter of April 19, 1909, that Kissel held the bonds at such last-named date.

This again helped forward the object of the conspiracy by tending to keep the American Company's relation to and control of what was going on unknown to those connected with the Pennsylvania Company.

(c) On May 3, 1907, Kissel demanded, and on May 10, 1907, he received, payment by the American Company of certain expenses in connection with his action under the conspiracy. As already shown, these transactions tended to keep Kissel a member of the conspiracy and to induce his continued service in aid of the conspiracy.

C. No overt act within three years is shown on the part of defendant Harned; but he is responsible, by reason of the continued existence of the conspiracy agreement or confederation up to the finding of the indictment on the part of all defendants, for all the overt acts done within three years by any of the other conspirators.

FIFTH.

If a special plea of the statute of limitations may raise any issue of fact at all, that issue must be solely concerning the time of the offense charged in the indictment. Defendant's plea, beside seeking to question the time of the offense, expressly traverses that any of the overt acts which the indictment alleges to have been done within three years were of a character tending to effect the object of the conspiracy, and also traverses defendant's participation at any time in any such overt acts; and further attempts to make an argumentative denial that the Pennsylvania Company's elimination from competition with the American Company was caused by the conspiracy after the receivership of October 2, 1906. The plea is therefore duplicitous in that, beside questioning the time of the offense, it denies allegations of the indictment which only a plea of not guilty can dispute.

1. The traverses made by the plea on other points than time of offense are:

(*a*) "That the acts and things alleged in said indictment to have been done within said period of three years, whether by him or by others, were not acts or things in aid or furtherance of or tending to effect the object of any such conspiracy or conspiracies." (Rec., 32.) This disputes the organic relation of such acts to the conspiracy, whenever done.

(*b*) "That the alleged overt acts and things averred in said indictment to have been done * * * within three years next preceding the finding of said indictment * * * were each and all of them done without this defendant's participation, knowledge, consent, agreement, authority, or ratification." (Rec., 32, 33.) This denies any assent of defendant to such overt acts, whenever done.

(*c*) The plea asserts that after October 2, 1906, the Pennsylvania Company's property and affairs were under a receivership and that its officers were enjoined from intermeddling with the property. (Rec., 33, 34.) The effect claimed for these facts is not stated by the plea; but the purpose of the averments can be only to deny argumentatively that after October 2, 1906, the Pennsylvania Company was kept out of business as a result of the conspiracy.

2. The impropriety of such traverses and additions to a mere issue on the single point of the time when the things alleged in the indictment occurred

is shown by the fact that a plea of the statute of limitations certainly can not have in criminal procedure a wider scope than it is allowed in a civil case. The authorities on this point, beside the special effect of the Criminal Appeals Act upon the question, are stated on pages 20–30, *ante*. I repeat only the explicit statement of Stephen concerning civil pleading that union of matter in confession and avoidance and a traverse in the same plea makes it duplicitous. (Stephen on Pleading, 9th Am. ed., by Heard, 258.)

SIXTH.

Whatever may be the permissible office of plea of the statute of limitations in a Federal criminal case, the true construction of this plea is that it does not absolutely deny the existence of a conspiracy within three years, but asserts that no conspiracy existed within that time if no overt act was done within three years; and, as shown in the Fourth Point (pp. 32–56, ante), absence of an overt act within three years does not show nonexistence of the conspiracy within that time.

1. The rule, of course, is that the plea must be construed more strongly against the pleader. (*United States* v. *Linn*, 1 How., 104, 110, 111.)

2. In particular, a special plea of the statute of limitations in a criminal case should be construed with rigor against defendant; because he can make the same defense under a plea of not guilty, and he ought not to be allowed any advantage from a special plea which is uncertain in the least degree. Maintenance of the special plea against the Government will end the prosecution, unless this court

itself allows the Government to plead over; while, if the special plea be overruled, no harm can come to defendants.

3. It is fairly obvious from the whole plea that its theory is that there was no conspiracy within three years because no overt act was done within that time. The coupling of the assertion that defendant did not participate in a conspiracy within three years with the repeated and varied claims that no overt act occurred within that time shows the vital relation of the two positions.

In particular, why does the plea deny that the overt acts alleged by the indictment to have been done by others than Kissel and Harned within three years had any organic relation to the conspiracy? If the conspiracy did not itself exist within three years on defendant's part, it could make no difference whether the other defendants did anything within that time or what sort of thing they did. Likewise, why does the plea deny that Kissel's own admitted acts within three years were of a kind to promote the conspiracy; when, if the plea was intended to deny absolutely that he was a member of the conspiracy within three years, it was quite immaterial whether his admitted acts within that time were of a kind to promote the conspiracy, because the acts anyway must have been done innocently by Kissel if he was not in the conspiracy.

Conclusively, however, the indictment alleges that each overt act done within three years was done "*in pursuance* of said unlawful and corrupt conspiracy,

and to effect the object of the same." This assertion is repeated every time. (Rec., 7, 9–11, 13, 15–18.) Kissel does not deny that his own admitted acts within three years were "in pursuance of" the conspiracy. Notwithstanding the repetition of the phrase in the indictment, he carefully limits his claim to a statement that the acts done within three years, *whether by him or others*, "were not acts or things in aid or furtherance of or to effect or tending to effect the object of any such conspiracy or conspiracies." (Rec., 32.) The difference is that Kissel does not deny that his acts within three years were done *with an intent* to promote the conspiracy, but limits his claim to the point that his acts did not in fact operate to promote the conspiracy. Indeed, Kissel could hardly himself deny that *others* than himself were in the conspiracy within three years and intended to promote it; and he does not deny that the other defendants were all the time in the conspiracy. How, then, could he deny their intent as to any of their acts? And his denial as to his own overt acts is no wider than his denial concerning the overt acts of others. Also, it is noticeable that Harned does not narrow his denial as Kissel does, but asserts that he did nothing within three years "in pursuance or ratification of or to effect or tending to effect the object of any conspiracy." (Rec., 52.) We get then to the point that, unless the plea is to be construed liberally rather than strictly and its uncertainties are to be resolved in favor of defendant, Kissel does not deny that his acts with-

in three years were done *with intent* to advance the conspiracy. The general averment of the plea that Kissel did not participate in any conspiracy within three years will therefore be inconsistent with his failure to deny that his own acts within three years were done with intent to advance the conspiracy, unless such general averment is taken as asserting merely that no conspiracy existed on his part within that time *because* neither he nor the others did any act within that time which actually tended to promote the conspiracy. In other words, the negation of the conspiracy's existence within three years is based upon the supposed legal rule that the conspiracy ceases to exist if within three years no act is done which actually tends to promote the object of the conspiracy. That theory, as already argued, is entirely unfounded.

The plea, then, is bad on its face, unless it is helped by the averments that after October 2, 1906, the Pennsylvania Company's property and affairs were in the hands of a receivership and its officers were enjoined from intermeddling with its property. (Rec., 33.) Those averments can avail nothing.

The conspiracy might nevertheless exist and acts might still be done under it, whether in the general way of prolonging the receivership itself, or in the way of ruining the Pennsylvania Company utterly, or in the way of continuing the American Company's domination over the management of the Pennsylvania Company, either during or at the end of the receivership.

SEVENTH.

Even if the plea be held good on the ground that, though the indictment is good on its face, the plea can and does make an issue on the point whether the offense occurred within three years of the indictment and is also not duplicitous, because it adds other issues or attempts at issue to the issue of time, still the judgment of the Circuit Court should be modified by this court so as to allow the United States, upon remission of the case to the Circuit Court, to traverse the plea by replication and so obtain a trial of the question whether in fact the offense occurred within three years.

This court has full power now to modify the judgment "as the justice of the case may require." (Rev. Stat., sec. 701.)

The action of the district attorney in not asking of the Circuit Court leave to plead over was natural and proper in view of the fact that the Circuit Court actually treated the plea as a demurrer and held the indictment bad on its face. No replication to the plea, in that view of its operation, was necessary or appropriate. Further, a trial upon a replication would have been useless in the Circuit Court in advance of a decision by this court that the Circuit Court erred as to the law, and the indictment is good on its face. Upon such a trial the Circuit Court would simply repeat its decision that the indictment is bad, and the delay and expense of the trial would have been had for nothing.

The same thing will be true if this court now omits to settle the questions of law concerning the suffi-

ciency of the indictment and merely remands the case with leave to the United States to plead over.

CONCLUSION.

The judgment of the Circuit Court should be reversed; and if reversal is not proper, the judgment should at least be modified so as to permit the United States to make replication to the plea.

LLOYD W. BOWERS,
Solicitor-General.

SEPTEMBER, 1910.

APPENDIX.

In view of the rarity of the special plea of the statute of limitations, and to illustrate the unprecedented form of the defendants' pleas, the Government presents the following typical examples of that plea in Federal criminal practice:

UNITED STATES CIRCUIT COURT, SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES
v.
HENRY HEWECKER.

Now comes the defendant, Henry Hewecker, in person, and having heard the said indictment read, says:

That the United States ought not to further prosecute or try the said indictment against him, the said Henry Hewecker, because, he says, that it appears that the indictment herein was not found until the 10th day of March, 1896; that it appears upon the face of said indictment to be charged that the said defendant, Henry Hewecker, did, on the 17th day of January, 1892, on board the American schooner *Rebecca J. Moulton*, in the harbor of Havana, off the island of Cuba, with a certain revolver shoot one Edward J. Miller, inflicting a wound, from which wound the said Edward J. Miller thereafter, and on the 21st day of January, 1892, on land, in the hospital in Cuba, without the United States, did die, and said defendant alleges that said death took place more than three years prior to the finding of said indictment.

That such charges, if true, do not, under the laws of the United States, constitute the crime of willful murder, and that, therefore, under and by virtue of section 1043 of the Revised Statutes of the United States, this defendant should not be prosecuted or tried.

The said defendant, for a further plea, says that from the 17th day of January, 1892, and until the date of the finding of the said indictment, he had not fled from justice, but that he had been in the meantime, and at all the times between said dates, confined in the prison at Havana, Cuba, under a charge and a conviction for an assault inflicted in the city of Havana, and the said defendant, therefore, says that the offense with which he is charged by the said indictment is barred by the statute of limitations, and that the United States ought not to further prosecute the same, and that he, the said Henry Hewecker, is ready to verify the same; and wherefore he prays judgment that by the court here he may be dismissed and discharged from the said premises in the said indictment above specified.

HENRY HEWECKER.

(*United States* v. *Hewecker*, 164 U. S., 46; S. C. 79 Fed., 59; Rec. U. S. Sup. Ct., p. 7.)

SPECIAL PLEA.—UNITED STATES CIRCUIT COURT.

THE UNITED STATES OF AMERICA
v.
GEORGE W. KIRK, INDICTED WITH HERMAN HIRSCH, MORRIS HESS, AND OTHERS.

In the matter of the indictment against George W. Kirk, who is jointly indicted with Herman Hirsch,

Morris Hess, Charles L. Lawrence, and Robert Des Anges, for conspiracy and entry by false samples, etc.

And the said George W. Kirk, in his own proper person, cometh into court here, and having heard the said indictment read, says that the United States of America ought not further to prosecute the said indictment against him the said George W. Kirk, because he says that the several acts alleged constitute the several offenses in said indictment charged did not, if at all, arise, exist or accrue within two years next last before the finding of said indictment, to wit:

The said indictment avers the commission of said several acts or offenses on various days from the 1st day of September, 1873, and subsequently to the 13th day of September, 1874, to wit, on the 1st day of September, 1873, on the 13th day of September, 1873, on the 14th day of September, 1873, and on the 13th day of September, 1874, and that said indictment was not found, presented, or filed until February 3, 1877, and this the said George W. Kirk is ready to verify.

Wherefore he prays judgment, and that by this honorable court here he may be dismissed and discharged from the said premises in the said indictment specified and alleged.

GEORGE W. KIRK.

GEORGE H. FORSTER,
Of Counsel for the Defendant.

(*United States* v. *Hirsch*, 100 U. S., 33; Rec., pp. 5, 6.)

(Indorsed:) U. S. Circuit Court. The United States vs. George W. Kirk, indicted with Herman Hirsch, Morris Hess, et al. Copy special plea. George H. Forster, of counsel, 58 Wall st. Filed May 19, 1877.

UNITED STATES CIRCUIT COURT, SOUTHERN DISTRICT OF NEW YORK.

THE UNITED STATES
v.
HERMAN HIRSCH AND MORRIS HESS,
Impleaded, etc.

And the said Herman Hirsch and the said Morris Hess, each in his own proper person, comes into court here, and having heard the said indictment read, say, each for himself, that the said United States ought not further to prosecute the first and second counts of said indictment against him the said Herman Hirsch, or him the said Morris Hess, because they say, each for himself, that the conspiracies, combinations, confederations, and agreements in the aforesaid counts of said indictment charged, alleged, and set forth, as well as the acts, matters, and things therein charged, and alleged to have been done in pursuance of said conspiracies, combinations, confederations, and agreements, were made, entered into, performed, and completed, and the offenses charged in said counts of said indictment were committed, more than three years before the aforesaid indictment was found. And this they, the said Herman Hirsch and the said Morris Hess, are ready to verify; wherefore they pray judgment, and that by the court here they may be dismissed and discharged from the said premises in the said first and second counts in the said indictment specified.

G. W. KIRK.
HERMAN HIRSCH.
MORRIS HESS.

(*United States* v. *Hirsch*, 100 U. S., 33; Rec., p. 6.)

UNITED STATES CIRCUIT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE UNITED STATES
v.
JOHN W. NORTON.

In the matter of the indictment against John W. Norton for embezzlement, etc.

SPECIAL PLEA.

And the said John W. Norton, in his own proper person, cometh into court here, and having heard the said indictment read, says that the United States of America ought not further to prosecute the said indictment against him, the said John W. Norton; because, he says, that he is not a person who has fled from justice, and that the several acts alleged to constitute the several offences in said indictment charged did not, if at all, arise, exist, or accrue within two years next last before the finding of said indictment, to wit:

The said indictment avers the commission of said several acts or offenses on various days from the 1st day of August, 1871, and subsequently to the 25th day of October, 1800, to wit, on the 1st day of August, 1871; the 31st day of March, 1870; the 1st day of August, 1871; the 3d day of August, 1871; the 11th day of August, 1869; the 20th day of September, 1869; the 20th day of September, 1869; the 28th day of September, 1869; the 28th day of September, 1869; the 22d day of January, 1870; the 22d day of January, 1870; the 2d day of March, 1870; the 2d day of March, 1870; the 7th day of February, 1870; the 7th day of February, 1870; the 27th day of

January, 1870; the 27th day of January, 1870; the 31st day of March, 1870; the 21st day of March, 1870; the 17th day of March, 1870; the 17th day of March, 1870; the 10th day of March, 1870; the 30th day of April, 1870; the 30th day of April, 1870; the 19th day of April, 1870; the 19th day of April, 1870; the 1st day of April, 1870; the 1st day of November, 1870; the 1st day of November, 1870; the 3d day of August, 1871; the 3d day of August, 1871; the 26th day of October, 1800; the 26th day of October, 1870; the 3d day of August, 1871; the 3d day of August, 1871. And that said indictment was not found, presented, or filed until February, 21, 1874; and this, he, the said John W. Norton, is ready to verify.

Wherefore he prays judgment, and that by this honorable court here he may be dismissed and discharged from the said premises in the said indictment specified and alleged.

JOHN W. NORTON.

(*United States* v. *Norton*, 91 U. S., 566; Rec., pp. 17, 18.)

IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE NORTHERN DISTRICT OF CALIFORNIA.

THE UNITED STATES OF AMERICA, Plaintiff, *v.* GEORGE W. BRACE AND ALBERT B. Young, defendants.	Special plea No. 4352.

And now comes the said Albert B. Young, in his own proper person, into court, and having heard read the indictment presented and found against him by the grand jurors of the United States of America, within and for the district aforesaid, and filed herein

on the 8th day of September, 1905, says that the said United States ought not further to prosecute said indictment against him, the said Albert B. Young, because he says that the crime set forth and alleged in said indictment is barred by the provisions of section 1044 of the Revised Statutes of the United States of America, in that more than three years had elapsed between the commission of said alleged crime and the finding of said indictment; to-wit, three years and eighty-nine days. And in this behalf, defendant alleges: That during all of said time between the commission of said alleged crime and the finding of said indictment, the said Albert B. Young was within the jurisdiction of the United States and subject to the process of said court, and at no time during said time was he a fugitive from justice or was he "fleeing from justice" within the meaning of section 1045 of the Revised Statutes of the United States. That at no time between the commission of said alleged offense and the filing of said indictment herein did the said defendant Albert B. Young leave his home or residence or known place of abode with intent to avoid detection or punishment for any public offense against the United States or any State or Territory; that at no time since the commission of said alleged crime did the defendant flee from justice or was he fleeing from justice with intent to avoid detection or punishment for any public offense against the United States or any State or Territory.

Wherefore, he prays judgment that he may be dismissed and discharged by this court from the said premises and the said indictment above specified.

J. F. QUINN,
Attorney for Albert B. Young.

STATE OF CALIFORNIA, } ss.
County of Humboldt. }

Albert B. Young, the defendant named in said indictment and in this prosecution, being first duly sworn according to law, makes oath, deposes, and says that the foregoing plea is true in substance and matter of fact, and that the said defendant has always been subject to the process of this court, and at no time between the 10th day of June, 1902, and the finding of said indictment was he a fugitive from justice or was he fleeing from justice within the meaning of section 1045, Revised Statutes of the United States.

ALBERT B. YOUNG.

Subscribed and sworn to before me this 23d day of January, 1906.

GEO. T. ROLLEY,
Notary Public, in and for the
County of Humboldt, State of California.

(Taken from the Government's files and quoted in part in *United States* v. *Brace*, 149 Fed., 874, 876, 877, 878.)

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